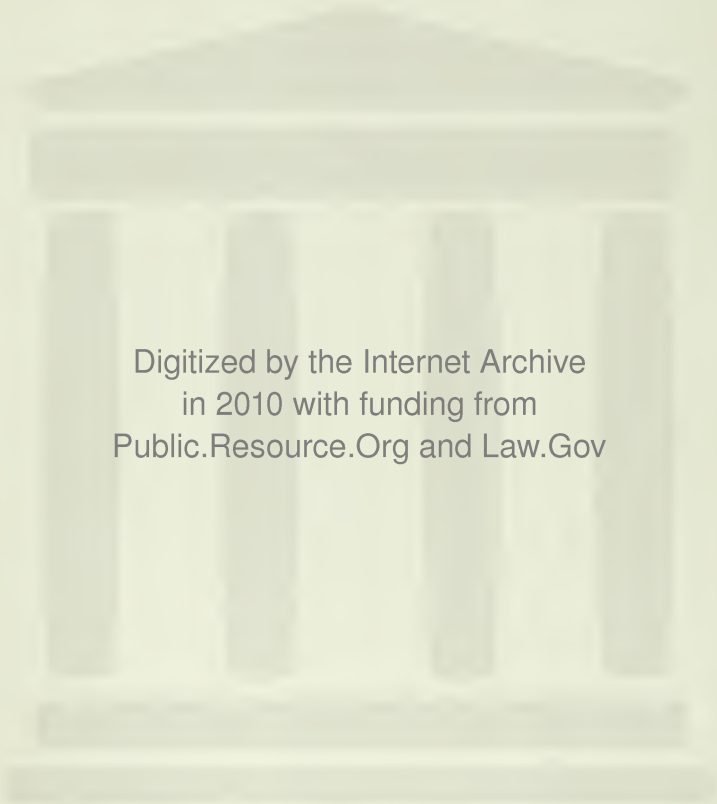
San Francisco
Law Library

EXTRACT FROM BY-LAWS

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. Any party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.



No. 11074 2415

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellant,

vs.

M. R. LUSTER and A. M. LUSTER, Individually and as Co-partners doing business as Sunbeam Furniture Sales Co.,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

Rotary Colorprint, 661 Howard Street, San Francisco

No. 11074

United States

Circuit Court of Appeals

For the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellant,

vs.

M. R. LUSTER and A. M. LUSTER, Individually and as Co-partners doing business as Sunbeam Furniture Sales Co.,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

Rotary Colorprint, 661 Howard Street, San Francisco

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellant:

H. EUGENE BREITENBACH

WM. U. HANDY

JOSEPH K. COADY

HARRY F. MOLL

1031 South Broadway
Los Angeles 15, Calif.

For Appellees:

SAMUEL A. MILLER

700 Lane Mortgage Bldg.
Los Angeles 14, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States Southern District of California, Central Division

No. 3574 O'C

CHESTER BOWLES, Administrator, Office of Price Administration,

Plaintiff,

vs.

M. R. LUSTER and A. M. LUSTER, individually and as co-partners, doing business as SUNBEAM FURNITURE SALES CO.,

Defendants.

COMPLAINT FOR INJUNCTION

1. In the judgment of the Administrator defendants M. R. Luster and A. M. Luster, individually and as co-partners, doing business as Sunbeam Furniture Sales, have engaged in acts and practices which constitute violations of Section 4(a) of the Emergency Price Control Act of 1942 (Public L. No. 421, 77th Cong., 2d Sess., 56 Stat. 23), hereinafter called the "Act" in that the defendants have violated the General Maximum Price Regulation, as amended, (7 F.R. 3153) effective in accordance with the provisions of the Act, and therefore, pursuant to Section 205(a) of the Act, the Price Administrator brings this action to enforce Section 4(a) of said Act and said regulation.

2. Jurisdiction of this action is conferred upon the Court by [2] Section 205(e) of the Act.

3. Pursuant to the provisions of Section 2(a) of the Act, the Price Administrator issued and

there was published in the Federal Register the General Maximum Price Regulation effective May 11, 1942 (7 F.R. 3153) hereinafter referred to as the "Regulation", which Regulation as amended has been at all times since the date of its issuance in full force and effect.

4. At all times hereinafter mentioned defendants have been and now are engaged in business selling as wholesalers or jobbers tables, lamps, hampers, bookcases, chairs, bedroom sets, dinnerware sets, bridge sets, and divers other commodities and furniture, for which, upon sale by defendants, maximum prices are and were established by said Regulation. Said commodities are hereinafter referred to as "commodities".

5. Defendants have violated the Regulation in the following particulars:

A. Defendants have failed and neglected to keep and make available for examination by the Office of Price Administration, records as required by Section 1499.12 of the Regulation, showing as precisely as possible the basis upon which the defendants determined maximum prices in accordance with the pricing provisions of the Regulation for commodities sold by them.

B. Defendants have failed to compute their maximum prices as required by Section 1499.2 of the General Maximum Price Regulation, or to submit to the Office of Price Administration reports applying for specific authorization of maximum prices as required by Section 1499.3-

(a) of the Regulation for commodities sold by them.

Wherefore, the plaintiff prays for relief as follows:

I. For a permanent injunction directed to the defendants, defendants' agents, employees, servants and attorneys, and all other [3] persons in active concert or participation with any of them, jointly and severally:

A. Directing them forthwith,

1. To prepare, keep and make available for examination by the Office of Price Administration records hereinafted called "current pricing records" showing as precisely as possible the basis upon which defendants determined maximum prices in accordance with the pricing provisions of the Regulation for commodities sold by defendants after May 11, 1942, as required by Section 1499.12 of the Regulation; and

2. To keep and make available for examination by the Office of Price Administration records of the same kind as they have customarily kept, relating to the prices which they charged for commodities sold by them after May 11, 1942, as required by Section 1499.12 of said Regulation; and

3. To prepare and file with the district office of the Office of Price Administration, Los Angeles, California, an application for specific authorization of maximum prices, as required by Section 1499.3(a) of the Regulation, for commodities sold by defendants for which the maximum prices can-

not be determined under Section 1499.2 of the Regulation.

B. Restraining them from engaging in or causing any of the following acts or omissions to act:

1. Selling, delivering or offering to sell or deliver any of said commodities unless and until defendants first comply as to such commodity, with the directions contained in demands designated "1", "2", and "3" under "A" immediately above.

2. Selling, delivering or offering to sell or deliver said commodities at prices in excess of the maximum prices established therefor by the Regulation, or by any other regulation establishing maximum prices for said commodities; and

3. Doing or omitting to do any other act in violation of the Regulation or of any other regulation establishing maximum prices for said commodities; and [4]

4. Offering, soliciting, attempting or agreeing to do any of the foregoing.

II. For costs of suit herein, and for such other and further relief as the Court may deem just and proper.

Dated: April 15,1944

H. EUGENE BREITENBACH
ROGER E. JOHNSON
DAVID M. HOFFMAN
HARRY F. MOLL
Attorneys for Plaintiff [5]

State of California
County of Los Angeles
United States of America—ss.

Harold L. Snyder, being by me first duly sworn, deposes and says:

That he is an employee of the United States Government, and during the time specified in the Complaint as hereinabove set forth, he was employed as an investigator for the Office of Price Administration, an agency of the United States Government; that in the course of his duty as an investigator for the Office of Price Administration he made an investigation of the matters set forth and mentioned in the above entitled action; that he has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

HAROLD L. SNYDER

Subscribed and sworn to before me this 15th day of April,1944

[Seal] ESTHER BLAISDELL

Notary Public in and for the County of Los Angeles, States of California

My Commission expires May 14, 1946

[Endorsed]: Filed April 15, 1944. [6]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS

Come now the defendants and in answer to plaintiff's complaint on file herein admit, deny and allege as follows, to-wit:

1. Deny that they have knowingly and intentionally engaged in acts and/or practices which constitute violations of Section 4(a) of the Emergency Price Control Act of 1942 (Public L. No. 421, 77th Cong., 2d Sess., 56 Stat. 23), in that they have violated the General Maximum Price Regulation, as amended, or otherwise.

2. Deny that they have violated the Regulation in that they have failed and/or neglected to keep and/ or make available for examination by the Office of Price Administration records as required by Section 1499.12 of the Regulation showing as precisely as possible the basis upon which the defendants determined maximum prices in accordance with the pricing provisions of the Regulation for commodities sold by them, and/or that they have failed to [7] compute their maximum prices as required by Section 1499.2 of the General Maximum Regulation, and/or that they failed to submit to the Office of Price Administration reports applying for specific authorization of maximum prices as required by Section 1499.3(c) of the Regulation for commodities sold by them for the reason that they were able to price under other sections and therefore it was not necessary for them to file applications for specific authorization, and they further

allege the facts to be as hereinafter set forth and not otherwise.

And as and for an Affirmative Defense to Plaintiff's Complaint on File Herein These Answering Defendants Allege:

1. That they commenced the business in which they are engaged during the month of October 1942, at a time after the effective date of the General Maximum Price Regulation; that they were, therefore, not in business in March 1942, and have no base period records nor are they required to have base period records for the reason hereinabove set forth.

2. That at all times the defendants have had in their possession and at their place of business for examination by the Office of Price Administration various records in connection with the operation of their business and in particular inventory control cards from which it was possible for these defendants to determine as precisely as possible the basis upon which they fixed the maximum prices for the sale of their commodities, which in their opinion and in their best judgment was in accordance with the pricing provisions of the Regulation covering the commodities sold by them.

3. That on or about the 28th day of March, 1944, one, Harold M. Snyder, representing himself as an investigator for the Office of Price Administration, called at the defendants place of business for the purposes, as he stated, of examining the records of these defendants, and when said investigator was advised by the defendants that among the

records maintained by them there were those of inventory control upon which records the goods that were being offered for sale was recorded as a basis for determining what jobbers all over the country were getting for similar merchandise, and when he was further informed that the said records would not be readily under- [8] standable to him, said investigator suggested that he would return in approximately three to four weeks, and desired these defendants during the interim to get together the various invoices of merchandise purchased in alphabetic form for his examination. That instead of returning, the complaint herein on file was filed, but nothwithstanding the failure of the investigator to return these defendants have since said date diligently and in good faith proceeded to transpose and transcribe their records from the usual manner in which they were kept by the defendants so as to show as precisely as possible and in a more composite form the basis upon which the prices charged by these answering defendants were determined.

4. That the defendants are engaged as showroom stock jobbers of the commodities set forth in Paragraph 4 of plaintiff's complaint, carrying stocks of merchandise purchased in the eastern parts of the United States. That the business locally is actually operated by Melvin R. Luster, who is the son of A. M. Luster, and said A. M. Luster is not actively engaged in the conduct of the business at Los Angeles but acts primarily as a buyer for the defendant business in the eastern

market, the defendants not doing any buying in the local market whatsoever.

And for a Further, Separate and Affirmative Defense These Answering Defendants Allege:

1. That they have not knowingly, wilfully or intentionally violated any of the Regulations of the Office of Price Administration appertaining to the commodities carried by them in their business. That they have at all times had in their possession insofar as they were able to ascertain the records that were required by the Office of Price Administration and by the Regulations, and when they were advised that the records which they had were not proper they diligently set about to revise the records in such regards so as to make them more easily understandable, and allege and believe that their records are now in proper form.

Wherefore, these answering defendants pray that the plaintiff be denied the relief prayed for, that the plaintiff take nothing by his complaint on file herein, and that the Court make a finding after a hearing and the [9] presentation of evidence that these answering defendants have fully complied with all of the Regulations appertaining to their business and that they have prepared, maintained and kept for the inspection of the Office of Price Administration the records required to be kept by them in their business.

SAMUEL A. MILLER

Attorney for Defendants [10]

State of California
County of Los Angeles—ss.

A. M. Luster, being by me first duly sworn, deposes and says: That he is one of the defendants in the above entitled action; that he has read the foregoing Answer of Defendants and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

A. M. LUSTER

Subscribed and Sworn to before me this 8th day of May, 1944

[Seal] SAMUEL A. MILLER
Notary Public in and for the County of Los Angeles, State of California

[Endorsed]: Filed May 8, 1944 [11]

[Title of District Court and Cause.]

MEMORANDUM DECISION

This action is brought under the authority of the Emergency Price Control Act of 1942 (Public L. No. 421, 77th Cong., 2d Sess., 56 Stat. 23), as amended, (Sec. 101 of Stabilization Extension Act of 1944, Public Law 383, 78th Cong., 2d Sess.), hereinafter called the "Act" and the General Maximum Price Regulation, as amended, (7 F. R. 3153), which was issued under the provisions of the Act on April 30, 1942, effective May 11, 1942.

The applicable provisions of the Act are Section 205(a), which provides for injunctive relief for any violation of Section 4 of the Act, and Section 4(a) which sets forth the acts and omissions to act that are prohibited by the Statute and furnish ground for injunctive relief under Section 205(a). [12]

The court finds that the plaintiff, under date of November 22, 1943, called the attention of defendants to the complaints against them and requested that they come to the Office of Price Administration in order to determine the method by which their merchandise was priced. The court finds that Mr. A. M. Luster telephoned from Chicago that he would appear within a period of two weeks to discuss the matter. Mr. M. R. Luster, a partner and one of the defendants, had charge of the business in Los Angeles. Sometime in the latter part of March, 1944, after the plaintiff had conducted an investigation, the defendant, A. M. Luster, called the plaintiff and was advised that the matter had been referred to the proper authorities for proper enforcement.

It would seem that the defendants were given an unusual opportunity, from the time they were advised of the complaints until this action was filed, but failed to make any attempt to comply with the request of the plaintiff. The court finds that the defendants did not keep proper records as disclosed by the testimony when the matter was investigated, and that the defendants have not properly priced their merchandise as required by the statute and the regulations.

The defendants contend that they have, since the investigation and the filing of the action, complied with the statute. It is not necessary for the court to pass upon this contention. A recent case decided by the Supreme Court of the United States is Walling, Administrator vs. Helmerich & Payne, Inc., (Nov. 6, 1944).....U. S. ....., wherein the court said:

> "Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power. See Hecht Co. v. Bowles, 321 U. S. 321, 327; Otis & Co. v. Securities and Exchange Commission, 106 F. 2d 579, 583-584." [13]

Judgment will be entered for the plaintiff against the defendants, and the prayer set forth in the complaint will be granted.

The plaintiff will prepare Findings of Fact, Conclusions of Law and Judgment within ten days after the date of this memorandum decision.

Dated November 15, 1944.

J. F. T. O'CONNOR,
U. S. District Judge [14]

[Title of District Court and Cause]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on regularly for trial on October 19,1944, and the Court having heard the evidence and the matter having been submitted for

decision by the Court, the Court finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. That defendants, M. R. Luster and A. M. Luster, individually and as co-partners, doing business as Sunbeam Furniture Sales Co., have violated Section 4(a) of the Emergency Price Control Act of 1942 (Pub. L. 421, 77th Cong., 2d Sess., 56 Stat. 23) as amended, (Sec. 101 of Stabilization Extension Act of 1944, Public Law 383, 78th Cong. 2d Sess.), hereinafter called the "Act", in that defendants have engaged in acts and practices which constitute [15] violations of the General Maximum Price Regulation, as amended, issued and promulgated by the Administrator of the Office of Price Administration in accordance with the provisions of said Act, and which became effective for wholesale sales on May 11, 1942.

2. Jurisdiction of this action is conferred upon the Court by Section 205(e) of the Act.

3. During the period commencing on or about October 1, 1942, up to and including the date of the trial of this action on October 19, 1944, defendants M. R. Luster and A. M. Luster, have been engaged in the business of selling at wholesale household furniture and miscellaneous commodities, including tables, lamps, hampers, bookcases, chairs, bedroom sets, dinnerware sets, bridge sets and divers other commodities and furniture at their place of business, located at 1337 South Flower Street, Los Angeles, California.

4. That under the provisions of Section 1499.12 of said General Maximum Price Regulation, which became effective May 11, 1942, and thereafter remained in effect and still is in effect, defendants were required to keep and make available for examination by the Office of Price Administration records showing as precisely as possible the basis upon which they determined maximum prices for those commodities sold after the effective date of said General Maximum Price Regulation and for which, upon sale by them, maximum prices are established by said General Maximum Price Regulation.

5. That under the provisions of Section 1499.2 of said General Maximum Price Regulation, defendants were required to price the commodities hereinabove referred to in accordance with the provisions of Section 1499.2 of the General Maximum Price Regulation, and were required to determine and report to the District Office of the Office of Price Administration, in accordance with Section 1499.3(a) of the Regulation, the maximum prices of any commodities which could not be priced by defendants under said Section 1499.2 of the Regulation, and in the case of commodities which could not be priced by defendants under said Section 1499.3(a), to file applications with the District Office of the Office of Price Administration and obtain approval of maximum prices in accordance with Section 1499.3(c) of the Regulation. [16]

6. That subsequent to the effective date of said General Maximum Price Regulation, defendants

sold as wholesalers or jobbers, furniture and other commodities, the maximum prices of which were established by the General Maximum Price Regulation.

7. That since Oct. 1st, 1942 defendants have knowingly failed and neglected to keep and make available for examination by the Office of Price Administration, current records showing as precisely as possible the basis upon which they determined their maximum prices for said household furniture and miscellaneous commodities which they sold as wholesalers subsequent to May 11, 1942.

8. The Court finds that the defendants were not in business in Los Angeles, California during March, 1942. The Court further finds that there were competitors of the same class as defendants in the city of Los Angeles, State of California, selling the same or similar commodities as the defendants, since March 1942. That since Oct. 1, 1942, defendants have failed and neglected to price said commodities in accordance with the provisions of Section 2(b) of the General Maximum Price Regulation, to-wit: defendants failed to determine their maximum prices from the highest prices charged during March, 1942 by the most closely competitive seller of the same class: that the Price Administrator issued and there was published in the Federal Register the General Maximum Price Regulation effective May 11, 1942 (7 F.R. 3153), referred to as the "Regulation", which Regulation as amended has been at all times since the date of its issuance in full force and effect.

9. That under date of November 22, 1943, the plaintiff by letter called the attention of the defendants to complaints against them, and requested that they come to the Office of Price Administration in order to determine the method by which they were pricing their merchandise. That Mr. A. M. Luster telephoned from Chicago, Illinois, that he would appear within a period of two weeks to discuss the matter. That Mr. M. R. Luster and one of the defendants had charge of the business in Los Angeles. That sometime after March, 1944, after plaintiff had conducted an investigation, the defendant A. M. Luster called plaintiff and was advised that the matter had been re- [17] ferred to Enforcement for proper enforcement action. The Court further finds that the defendants were given an unusual opportunity from the time they were first advised of the complaints to make a voluntary effort to comply with the plaintiff's request.

From the foregoing facts the Court makes the following

CONCLUSIONS OF LAW

1. That plaintiff is entitled to a permanent injunction directed to the defendants, their agents, employees, servants and attorneys, and all other persons in active concert or participation with any of them, jointly and severally:

A. Directing them forthwith,

1. To prepare, keep and make available for examination by the Office of Price Administration

records hereinafter called "Current pricing records", showing as precisely as possible the basis upon which defendants determined maximum prices in accordance with the pricing provisions of the Regulation for commodities sold by defendants after May 11, 1942, as required by Section 1499.12 of the Regulation; and

2. To keep and make available for examination by the Office of Price Administration records of the same kind as they have customarily kept, relating to the prices which they charged for commodities sold by them after May 11, 1942, as required by Section 1499.12 of said Regulation; and

3. To prepare and file with the District Office of the Office of Price Administration, Los Angeles, California, an application for specific authorization of maximum prices, as required by Section 1499.3-(c) of the Regulation, for commodities sold by defendants for which the maximum prices cannot be determined under Section 1499.2 of the Regulation.

B. Restraining them from engaging in or causing any of the following acts or ommissions to act:

1. Selling, delivering or offering to sell or deliver any of said [18] commodities unless and until defendants first comply as to such commodity with the directions contained in demands designated "1", "2" and "3" under "A" immediately above.

2. Selling, delivering or offering to sell or deliver said commodities at prices in excess of the maximum prices established therefor by the Regulation, or by any other regulation establishing maximum prices for said commodities; and

3. Doing or omitting to do any other act in violation of the Regulation or of any other regulation establishing maximum prices for said commodities; and

4. Offering, soliciting, attempting or agreeing to do any of the foregoing.

The Court further finds in reference to the contention of the defendants that they have since the investigation and the filing of this action, complied with the statute; that it is not necessary to pass upon this contention, as the Supreme Court in the case of the United States, Walling vs. Helmerich & Payne, Inc., decided November 6, 1944, held that "Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power". See Bowles vs. Hecht (34 U.S. 321, 327).

Let judgment be prepared and entered accordingly.

Dated at Los Angeles, California, this 14th day of December, 1944.

J. F. T. O'CONNOR
United States District Judge.

[Endorsed]: Filed Dec. 14, 1944. [19]

In the District Court of the United States Southern District of California, Central Division

No 3574-O'C

CHESTER BOWLES, Administrator, Office of Price Administration,

Plaintiff,

vs.

M. R. LUSTER and A. M. LUSTER, individually and as co-partners, doing business as SUNBEAM FURNITURE SALES CO.,

Defendants

JUDGMENT

The above entitled action for an injunction having been duly tried, and oral and documentary evidence having been introduced by the plaintiff and defendants, and the matter having been considered by the Court, and the Court having made its Findings of Fact and Conclusions of Law;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the defendants, M. R. Luster and A. M. Luster, individually and as co-partners, doing business as Sunbeam Furniture Sales Co., their agents, servants, employees, attorneys and all persons in active concert or participation with the defendants, be and they hereby are:

1. Order and directed to prepare, keep and make available for examination by the Office of Price Administration, records called "current [20] pricing records", showing as precisely as possible

the basis upon which defendants determined maximum prices in accordance with the pricing provisions of the General Maximum Price Regulation for all commodities sold by defendants after May 11, 1942, as required by Section 1499.12 of the Regulation.

2. Ordered and directed to determine and report to the district office of the Office of Price Administration, in accordance with Section 1499.3(a) of the Regulation, the maximum prices of any commodities which cannot be priced under Section 1499.2 of the Regulation, and in the case of commodities which cannot be priced by defendants under said Section 1499.3(a), to file applications with the district office of the Office of Price Administration and obtain approval of maximum prices in accordance with Section 1499.3(c) of the Regulation.

3. Permanently enjoined from selling, delivering, transferring or offering to sell, deliver or transfer commodities at prices in excess of the prices permitted by the General Maximum Price Regulation, as heretofore or hereafter amended or any other regulation promulgated by the Office of Price Administration governing the maximum prices of said commodities.

4. Permanently enjoined from doing or omitting to do any other act in violation of the General Maximum Price Regulation, as heretofore or hereafter amended, issued pursuant to the Emergency Price Control Act of 1942.

It Is Further Ordered, Adjudged and Decreed that the jurisdiction of this cause is retained for

the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction of or the carrying out of this decree, for the modification thereof and the enforcement of compliance therewith, and for the punishment of any violations thereunder.

Dated at Los Angeles, California, this 14th day of December, 1944.

J. F. T. O'CONNOR
United States District Judge

Judgment entered December 14, 1944. Docketed Dec. 14, 1944. Book C O, Page 510.

EDMUND L. SMITH,
Clerk,
FRANCIS E. CROSS,
Deputy.

[Endorsed]: Filed Oct. 14, 1944. [21]

[Title of District Court and Cause.)

MOTION OF DEFENDANTS FOR REHEARING AND MOTION TO AMEND FINDINGS, CONCLUSIONS AND JUDGMENT.

Come Now the defendants above named and respectfully represent to this Honorable Court that on the 14th day of December, 1944, a judgment was entered herein in favor of the plaintiff, which judgment was filed and entered and docketed in Civil Order Book 29 at page 510, which judgment was

an injunction against the defendants, and that in the opinion of the defendants the evidence was insufficient to justify the judgment herein, upon which ground defendants ask for a rehearing or a new trial.

That in the event the motion for rehearing or new trial be denied that the Findings and Conclusions of Law submitted herein by the plaintiff be amended in the following respects, and the judgment amended accordingly if the Findings and Conclusions are amended:

That Finding No. 7 be stricken in its entirety:

That portion of Finding No. 8 reading as hereinafter set forth [22] be stricken and omitted from the Findings:

> "That since May 11, 1942, defendants have failed and neglected to price said commodities in accordance with the provisions of Section 2(b) of the General Maximum Price Regulation to-wit: defendants failed to determined their maximum prices from the highest prices charged during March, 1942 by the most closely competitive seller of the same class".

That there be stricken from Findings No. 9 the following:

> "That Mr. A. M. Luster telephoned from Chicago, Illinois, that he would appear within a period of two weeks to discuss the matter. That Mr. M. R. Luster and one of the defendants had charge of the business in Los Angeles. That sometime after March 1944, after plaintiff had conducted an investigation,

the defendant A. M. Luster called plaintiff and was advised that the matter had been referred to Enforcement for proper enforcement action."

That there be stricken from the Conclusions of Law based upon the plaintiff's Findings, Conclusion No. 3 as there was no evidence to indicate that it was necessary for the defendants to file an application under Section 1499.3(c) of the Regulation.

That there also be stricken from the Conclusions of Law the following proposed Conclusions offered by the plaintiff as appears on Page 5 thereof, read as follows:

"or by any other regulation establishing maximum prices for said commodities; and

Doing or omitting to do any other act in violation of the Regulation or of any other regulation establishing maximum prices for said commodities; and

Offering, soliciting, attempting or agreeing to do any [23] of the foregoing."

That the basis and authority for striking the last-above enumerated and quoted Conclusions submitted by the plaintiff are the cases of Bowles vs. Sacher Fur Co. and Bowles vs. Schein and Janowsky decided in the United States Circuit Court of Appeals under date of on or about December 11, 1944 in a decision written by the Honorable Judge Swan on an appeal taken by the Price Administrator from a decision of District Judge Rifkind who refused to include in an omnibus judgment

for injunction presented by the Office of Price Administration in broad language restraining the defendants from "doing or omitting to do any other act in violation of said Regulation as heretofore or hereafter amended", the District Judge limiting the injunction to the specific violations conceded or proven.

The above motions will be based upon this motion and upon all the pleadings and papers on file and upon the minutes of the Court, upon the Reporter's Transcript of his shorthand notes which are on file herein, and under the authority of Rules of Civil Procedure 52(b) and 59(a),(b).

Dated this 22nd day of December, 1944.

SAMUEL A. MILLER
Attorney for defendants.

[Endorsed]: Filed Dec. 26, 1944. [24]

At a stated term, to-wit: The January Term, A. D. 1945, of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of San Diego on Tuesday the 2nd day of January in the year of our Lord one thousand nine hundred and forty-five.

Present: The Honorable J. F. T. O'CONNOR, District Judge.

[Title of Cause.]

ORDER

This cause coming on for hearing of motion of defendants for a re-hearing or a new trial, pursuant to motion filed December 26, 1944; J. K. Coady, Esq., appearing as counsel for the plaintiff; and C. W. McClain, Court Reporter, being present and reporting the proceedings:

It is ordered that the said motion of defendants be, and it hereby is, dismissed, there being no appearances in behalf of the defendants as this time, and exception allowed to defendants. [25]

[Title of District Court and Cause.]

STIPULATION PERMITTING REINSTATEMENT OF MOTION OF DEFENDANTS FOR REHEARING AND MOTION TO AMEND FINDINGS, CONCLUSIONS AND JUDGMENT, AND ORDER ON SAID STIPULATION.

It Is Hereby Stipulated and Agreed by and between the parties hereto by their respective counsel, that the motion of defendants for rehearing and motion to amend Findings, Conclusions and Judgment which was dismissed on January 2nd, 1945, by the Honorable J. F. T. O'Connor, Judge of the District Court, may be reinstated and placed upon the Court's law and motion calendar for disposition on Monday, the 29th day of January, 1945, or at such other date as the Court may direct.

Dated: January 15th, 1945.

H. EUGENE BREITENBACH,
WM. U. HANDY, DAVID M.
HOFFMAN and HARRY F.
MOLL

By WM. U. HANDY
Attorneys for Plaintiff
SAMUEL A. MILLER
Attorney for Defendants

It is so ordered: Dated this 18th day of January, 1945.

J. F. T. O'CONNOR
District Judge

[Endorsed]: Filed Jan. 18, 1945. [26]

[Title of District Court and Cause.]

ORDER OF COURT AMENDING FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT, FILED DECEMBER 14TH, 1944.

Counsel for the defendants having filed his motion for a rehearing and to amend Findings, Conclusions and Judgment, under date of December 26th, 1944; and, pursuant to stipulation filed on January 18th, 1945, the said motion having come before the Court for hearing on January 29th, 1945, and at that time the Court having heard the arguments of counsel, and having considered the motion, Now Orders As Follows:

The said motion of counsel for a rehearing is hereby denied.

With respect to the said motion to amend Findings of Fact, Conclusions of Law and the Judgment, it is hereby ordered that:

(1) The motion to strike Finding 7 in its entirety is denied, except that the date in Finding 7 will be changed from "May 11, 1942," to "October 1, 1942." (page 3, lines 5 and 10).

(2) The motion to strike certain parts of Finding 8 will be denied except that on line 15 thereof the date "May 11" will be stricken; and, in lieu thereof, the date "October 1" will be inserted (page 3).

(3) The motion to strike out certain parts of Finding 9 is denied (pages 3 and 4). [27]

(4) The motion to strike from the Conclusions of Law, Conclusion No. 3, is denied.

(5) The motion to strike the following language "or by any other regulation establishing maximum prices for said commodities", paragraph 2, page 5, from the Conclusions of Law, is granted (Lines 6 and 7).

(6) With respect to the motion to strike paragraph 3 of the Conclusions of Law, page 5, "doing or omitting to do any other act in violation of the regulation or of any other regulation establishing maximum prices for said commodities", there will be stricken from such paragraph the following language commencing on line 9 of paragraph 3, page 5, "or of any other regulation establishing maximum prices for said commodities".

(7) The motion to strike paragraph 4 of the Conclusions of Law, page 5, line 11, "offering, soliciting, attempting or agreeing to do any of the foregoing" is granted.

The court on its own motion strikes out "May 11," on line 4, of page 2 of the Judgment, and inserts in lieu thereof "October 1," and there is also stricken from pargraph 3 of the Judgment, page 2, line 16, the following language, "or hereafter amended or any other regulation promulgated by the Office of Price Administration governing the maximum prices of said commodities".

There is stricken from paragraph 4 of the Judgment, page 2, commencing on line 20, the following language "as heretofore or hereafter amended, issued pursuant to the Emergency Price Control Act of 1942"; and, in lieu thereof, the following language is ordered to be inserted: "in effect at the time of filing this action".

It is further ordered that there be stricken from the Judgment the following language commencing on line 23 and ending on line 28, page 2 of the Judgment: "It is further ordered, adjudged and decreed that the jurisdiction of this cause is retained for the purpose of enabling any of the parties to this decree to apply to the Court at any time for such further orders and directions as may be necessary or appropriate for the construction of or the carrying out of this decree, for the modification thereof and the [28] enforcement of compliance therewith, and for the punishment of any violations thereunder".

It is the opinion of the Court that to require the defendants to be bound by, or to require the defendants to be subject to, penalties for the violation of "any other act in violation of the regulations" or for "offering, soliciting, attempting or agreeing to do any of the foregoing," or to compel defendants to be bound by any future regulation, would deprive the defendants of their day in court, and would be a denial of the right of the defendants if the Court found that in good faith they should be permitted to attack a regulation before The Emergency Court of Appeals; in all other respects the Findings of Fact, Conclusions of Law and the Judgment are affirmed.

It is the opinion of the Court that jurisdiction should not be retained in these actions for the purposes stated in the Judgment. If future violations are found to occur by the plaintiff another action can be instituted. It is not the policy of this Court to keep defendants in a state of suspended animation, or hold above their heads the sword of Damocles which may fall at any moment, not knowing when they will be brought into court on contempt proceedings for a violation, real or alleged.

(See Hecht Company v. Bowles, 321 U.S. 321 64 S. Ct. 587; Bowles v. Town Hall Grill, 145 Fed (2d) 689; Bowles v. Huff (9 CCA) Decided 12/27/44....Fed, (2d).....

Counsel for the plaintiff will prepare amended Findings of Fact and Conclusions of Law and Judgment within ten days after notice of this Order and in accordance therewith, for the signa-

ture of the Court, after presenting some to counsel for the defendants for approval as to form.

Dated: Los Angeles, Calif., February 2nd, 1945.

J. F. T. O'CONNOR
U.S. District Judge

[Endorsed]: Filed Feb. 2, 1945. [29]

[Title of District Court and Cause.]

AMENDED FINDINGS OF FACT AND CONCLUSION OF LAW

This cause came on regularly for trial on October 19, 1944, and the Court having heard the evidence and the matter having been submitted for decision by the Court, and the Court having made its findings of fact and conclusions of law and a motion having been made to amend said findings of fact and conclusions of law and said motion having been granted, the Court now makes its amended findings of fact and conclusions of law and finds the facts and states the conclusions of law as follows:

FINDINGS OF FACT

1. That defendants, M. R. Luster and A. M. Luster, individually and as co-partners, doing business as Sunbeam Furniture Sales Co., have violated Section 4(a) of the Emergency Price Control Act of 1942 (Pub. L. 421) 77th Cong. 2d Sess., 56 Stat. 23) as amended, (Sec. 101 of Stabilization Exten- [30] sion Act of 1944, Public Law 383, 78th Cong.

2d Sess.), hereinafter called the "Act", in that defendants have engaged in acts and practices which constitute violations of the General Maximum Price Regulation, as amended, issued and promulgated by the Administrator of the Office of Price Administration in accordance with the provisions of said Act, and which became effective for wholesale sales on May 11, 1942.

2. Jurisdiction of this action is conferred upon the Court by Section 205(c) of the Act.

3. During the period commencing on or about October 1, 1942, up to and including the date of the trial of this action on October 19, 1944, defendants M. R. Luster and A. M. Luster, have been engaged in the business of selling at wholesale household furniture and miscellaneous commodities, including tables, lamps, hampers, bookcases, chairs, bedroom sets, dinnerware sets, bridge sets and divers other commodities and furniture at their place of business, located at 1337 South Flower Street, Los Angeles, California.

4. That under the provisions of Section 1499.12 of said General Maximum Price Regulation, which became effective May 11, 1942, and thereafter remained in effect and still is in effect, defendants were required to keep and make available for examination by the Office of Price Administration records showing as precisely as possible the basis upon which they determined maximum prices for those commodities sold after the effective date of said General Maximum Price Regulation and for which, upon sale by them, maximum prices are

established by said General Maximum Price Regulation.

5. That under the provisions of Section 1499.2 of said General Maximum Price Regulation, defendants were required to price the commodities hereinabove referred to in accordance with the provisions of Section 1499.2 of the General Maximum Price Regulation, and were required to determine and report to the District Office of the Office of Price Administration, in accordance with Section 1499.3(a) of the Regulation, the maximum prices of any commodities which could not be priced by defendants under said Section 1499.2 of the Regulation, and in the case of commodities which could not be priced by defendants under said Section 1499.3(a), to file applications with [31] the District Office of the Office of Price Administration and obtain approval of maximum prices in accordance with Section 1499.3(c) of the Regulation.

6. That subsequent to the effective date of said General Maximum Price Regulation, defendants sold as wholesalers or jobbers, furniture and other commodities, the maximum prices of which were established by the General Maximum Price Regulation.

7. That since October 1, 1942, defendants have knowingly failed and neglected to keep and make available for examination by the Office of Price Administration, current records showing as precisely as possibly the basis upon which they determined their maximum prices for said household furniture and miscellaneous commodities which

they sold as wholesalers subsequent to October 1, 1942.

8. The Court finds that the defendants were not in business in Los Angeles, California during March, 1942. The Court further finds that there were competitors of the same class as defendants in the City of Los Angeles, States of California, selling the same or similar commodities as the defendants, since March 1942. That since October 1, 1942, defendants have failed and neglected to price said commodities in accordance with the provisions of Section 2(b) of the General Maximum Price Regulation, to wit: defendants failed to determine their maximum prices from the highest prices charged during March, 1942 by the most closely competitive seller of the same class; that the Price Administrator issued and there was published in the Federal Register the General Maximum Price Regulation effective May 11, 1942 (7 F.R. 3153), referred to as the "Regulation", which Regulation as amended has been at all times since the date of its issuance in full force and effect.

9. That under date of November 22, 1943, the plaintiff by letter called the attention of the defendants to complaints against them, and requested that they come to the Offices of Price Administration in order to determine the method by which they were pricing their merchandise. That Mr. A. M. Luster telephoned from Chicago, Illinois, that he would appear within a period of two weeks to discuss the matter. That Mr. M. R. Luster and one of the defendants had charge of the business in

Los Angeles. That sometime [32] after March 1944, after plaintiff had conducted an investigation, the defendant A. M. Luster called plaintiff and was advised that the matter had been referred to Enforcement for proper enforcement action. The Court further finds that the defendants were given an unusual opportunity from the time they were first advised of the complaints to make a voluntary effort to comply with the plaintiff's request.

From the foregoing facts the Court makes the following:

CONCLUSIONS OF LAW

1. That plaintiff is entitled to a permanent injunction directed to the defendants, their agents, employees, servants and attorneys, and all other persons in active concert or participation with any of them, jointly and severally:

A. Directing them forthwith,

1. To prepare, keep and make available for examination by the Office of Price Administration records hereinafter called "current pricing records", showing as precisely as possible the basis upon which defendants determined maximum prices in accordance with the pricing provisions of the Regulation for commodities sold by defendants after May 11, 1942, as required by Section 1499.12 of the Regulation; and

2. To keep and make available for examination by the Office of Price Administration records of the same kind as they have customarily kept, relating to the prices which they charged for commodities sold by them after May 11, 1942, as re-

quired by Section 1499.12 of said Regulation; and

3. To prepare and file with the District Office of the Office of Price Administration, Los Angeles, California, an application for specific authorization of maximum prices, as required by Section 1499.3(c) of the Regulation, for commodities sold by defendants for which the maximum prices cannot be determined under Section 1499.2 of the Regulation.

B. Restraining them from engaging in or causing any of the following [33] acts or omissions to act:

1. Selling, delivering or offering to sell or deliver any of said commodities unless and until defendants first comply as to such commodity with the directions contained in demands designated "1", "2" and "3" under "A" immediately above.

2. Selling, delivering or offering to sell or deliver said commodities at prices in excess of the maximum prices established therefor by the Regulation; and

3. Doing or omitting to do any other act in violation of the Regulation; and

The Court further finds in reference to the contention of the defendants that they have since the investigation and the filing of this action, complied with the statute; that it is not necessary to pass upon this contention, as the Supreme Court in the case of the United States, Walling vs. Helmerich & Payne, Inc., decided November 6, 1944, held that "Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the

ambit of judicial power". See Bowles vs. Hecht (34 U.S. 321, 327).

Let judgment be prepared and entered accordingly.

Dated at Los Angeles, California, this 12th day of February, 1945.

J. F. T. O'CONNOR
United States District Judge

[Endorsed]: Filed Feb. 12, 1945. [34]

[Title of District Court and Cause.]

AMENDED JUDGMENT

The above entitled action for an injunction having been duly tried, and oral and documentary evidence having been introduced by the plaintiff and defendants, and the matter having been considered by the Court, and the Court having made its Findings of Fact and Conclusions of Law and a motion having been made to amend the judgment and the said motion having been granted and the Court having made amended Findings of Fact and Conclusions of Law;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the defendants, M. R. Luster and A. M. Luster, individually and as co-partners, doing business as Sunbeam Furniture Sales Co., their agents, servants, employees, attorneys and all persons in active concert or participation with the defendants, be and they hereby are:

1. Ordered and directed to prepare, keep and

make available for [35] examination by the Office of Price Administration, records called "current pricing records", showing as precisely as possible the basis upon which defendants determined maximum prices in accordance with the pricing provisions of the General Maximum Price Regulation for all commodities sold by defendants after October 1, 1942, as required by Section 1499.12 of the Regulation.

2. Ordered and directed to determine and report to the district office of the Office of Price Administration, in accordance with Section 1499.3(a) of the Regulation, the maximum prices of any commodities which cannot be priced under Section 1499.2 of the Regulation, and in the case of commodities which cannot be priced by defendants under said Section 1499.3(a), to file applications with the district office of the Office of Price Administration and obtain approval of maximum prices in accordance with Section 1499.3(c) of the Regulation.

3. Permanently enjoined from selling, delivering, transferring or offering to sell, deliver or transfer commodities at prices in excess of the prices permitted by the General Maximum Price Regulation, as heretofore.

4. Permanently enjoined from doing or omitting to do any other act in violation of the General Maximum Price Regulation in effect at the time of filing this action.

Dated at Los Angeles, California, this 12th day of February, 1945.

J. F. T. O'CONNOR
United States District Judge

Approved as to form as required by Rule 7 this 10th day of Feb. 1945.

SAMUEL A. MILLER
Atty. for Defts.

Judgment entered Feb. 12, 1945. Docketed Feb. 12, 1945. Book C.O. 30, Page 672. Edmund L. Smith, Clerk, Francis E. Cross, Deputy.

[Endorsed]: Filed Feb. 12, 1945. [36]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Chester Bowles, Administrator of the Office of Price Administration, plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 12th day of February, 1945, in Central Division Civil Order Book 30 at pages 672 to 673 inclusive, in the Office of the Clerk of the above entitled Court.

Dated: May 10th, 1945.

H. EUGENE BREITENBACH
WM. U. HANDY
JOSEPH K. COADY
HARRY F. MOLL

[Endorsed]: Filed and mailed copy to Samuel A. Miller, attorney for defendants, May 10, 1945. [37]

[Title of District Court and Cause.]

ASSOCIATION OF ATTORNEYS

We hereby associate Joseph K. Coady, Enforcement Attorney, Office of Price Administration, as one of the attorneys for the plaintiff in the above entitled action in lieu and stead of David M. Hoffman, who is no longer connected with or an employee of the Office of Price Administration.

H. EUGENE BREITENBACH
WM. U. HANDY
DAVID M. HOFFMAN
HARRY F. MOLL
By WM. U. HANDY
Attorneys for Plaintiff

I hereby accept association as attorney for the Plaintiff in the above entitled action.

JOSEPH K. COADY
Enforcement Attorney [38]

I hereby consent to such association.

DAVID M. HOFFMAN

[Endorsed]: Filed May 10, 1945. [39]

[Title of District Court and Cause.]

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

The Court erred

(1) By granting the defendants' motion to modify the judgment;

(2) By restricting the injunction to regulations then in force and striking therefrom all reference to future amendments, which might later by promulgated, to the applicable regulations governing the same commodities;

(3) By eliminating from the injunction the prohibition against "offering, soliciting, attempting or agreeing to do any of the foregoing". [40]

Dated, Los Angeles, California, the .... day of ....., 1945.

H. EUGENE BREITENBACH
WM. U. HANDY
JOSEPH K. COADY
HARRY F. MOLL
By: HARRY F. MOLL
Attorneys for plaintiff-appellant

[Endorsed]: Filed May 22, 1945. [41]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

Plaintiff and Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

11. Complaint.

2. Answer of the defendants M. R. Luster and A. M. Luster.

3. Memorandum decision and order for judgment in favor of plaintiff, filed November 15, 1944.

4. Findings of fact and conclusions of law and judgment for permanent injunction.

5. Defendants' motion for rehearing, new trial, or to amend findings, conclusions, judgment, with points and authorities.

6. Order dismissing defendants' motion for rehearing, entered [42] January 2nd, 1945.

7. Stipulation and order permitting reinstatement of and placing case on calendar for January 29th, 1945 for hearing.

8. Defendants' motion for rehearing and to amend findings of fact, conclusions of law and judgment.

9. Order of Court amending findings of fact, conclusions of law and judgment, filed February 2nd, 1945.

10. Amended findings of fact, conclusions of law and judgment.

11. Notice of appeal, filed May 10th, 1945.

12. Substitution of attorneys filed May 10th, 1945.

13. This designation.

14. Statement of points on which appellant intends to rely.

H. EUGENE BREITENBACH
WM. U. HANDY
JOSEPH K. COADY
HARRY F. MOLL

By: HARRY F. MOLL
Attorneys for plaintiff-appellant

(Affidavit of Service by Mail attached.)

[Endorsed]: Filed May 22, 1945. [43]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 45 inclusive contain full, true and correct copies of Complaint for Injunction; Answer of Defendants; Memorandum Decision; Findings of Fact and Conclusions of Law; Judgment; Motion of Defendants for Rehearing and Motion to Amend Findings, Conclusions and Judgment; Minute Order Entered January 2, 1945; Stipulation and Order Permitting Reinstatement of Motion for Rehearing etc.; Order of Court Amending Findings of Fact, Conclusions of Law and Judgment; Amended Findings of Fact and Conclusions of Law; Amended Judgment; Notice of Appeal; Association of Attorneys; Statement of Points; Designation of Record and Affidavit of Service by Mail which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 13th day of June, 1945.

[Seal] EDMUND L. SMITH, CLERK

By: THEODORE HOCKE

Chief Deputy Clerk

[Endorsed]: No. 11074. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, Administrator, Office of Price Administration, Appellant, vs. M. R. Luster and A. M. Luster, Individually and as Co-partners doing business as Sunbeam Furniture Sales Co., Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed June 14, 1945.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11074

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellant,

vs.

M. R. LUSTER and A. M. LUSTER, individually and as co-partners, doing business as SUNBEAM FURNITURE SALES CO.,

Appellees.

STATEMENT OF POINTS

The points upon which appellant intends to rely on this appeal are as follows:

The Court erred

(1) By granting the appellees' motion to modify the judgment;

(2) By restricting the injunction to regulations then in force and striking therefrom all reference to future amendments, which might later be promulgated, to the applicable regulations governing the same commodities;

(3) By eliminating from the injunction the prohibition against "offering, soliciting, attempting or agreeing to do any of the foregoing".

Dated: June 11, 1945

H. EUGENE BREITENBACH
WM. U. HANDY
JOSEPH K. COADY
HARRY F. MOLL
By: HARRY F. MOLL
Attorneys for Appellant

[Endorsed]: Filed June 14, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD

Appellant designates the following portions of the record, proceedings and evidence to be contained in the record on appeal in this action:

1. Complaint.

2. Answer of the appellees M. R. Luster and A. M. Luster.

3. Memorandum decision and order for judgment in favor of appellant, filed November 15, 1944.

4. Findings of Fact and conclusions of law and judgment for permanent injunction.

5. Appellees' motion for rehearing, new trial, or to amend findings, conclusions, judgment, with points and authorities.

6. Order dismissing appellees' motion for rehearing, entered January 2nd, 1945.

7. Stipulation and order permitting reinstatement of and placing case on calendar for January 29th, 1945 for hearing.

8. Appellees' motion for rehearing and to amend findings of fact, conclusions of law and judgment.

9. Order of Court amending findings of fact, conclusions of law and judgment, filed February 2nd, 1945.

10. Amended findings of fact, conclusions of law and judgment.

11. Notice of appeal, filed May 10th, 1945.

12. Substitution of attorneys filed May 10th, 1945.

13. This designation.

14. Statement of points on which appellant intends to rely.

H. EUGENE BREITENBACH
WM. U. HANDY
JOSEPH K. COADY
HARRY F. MOLL
By: HARRY F. MOLL
Attorneys for Appellant.

[Endorsed]: Filed June 14, 1945. Paul P. O'Brien, Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11,074

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

M. R. LUSTER AND A. M. LUSTER, INDIVIDUALLY AND AS CO-PARTNERS, DOING BUSINESS AS SUNBEAM FURNITURE SALES CO., APPELLEES

APPELLANT'S BRIEF

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
DAVID LONDON,
Chief, Appellate Branch,
KARL E. LACHMANN,
Attorney,
Office of Price Administration,
Washington 25, D. C.

HERBERT H. BENT,
Regional Litigation Attorney.
H. EUGENE BREITENBACH,
District Enforcement Attorney,
WM. U. HANDY,
Litigation Attorney,
Office of Price Administration,
Los Angeles, California.

INDEX

AUTHORITIES CITED

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11,074

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

M. R. LUSTER AND A. M. LUSTER, INDIVIDUALLY AND AS CO-PARTNERS, DOING BUSINESS AS SUNBEAM FURNITURE SALES CO., APPELLEES

APPELLANT'S BRIEF

This is an appeal from a final judgment of the United States District Court for the Southern District of California, Central Division, in an action brought by the Price Administrator to enjoin defendants from violating the General Maximum Price Regulation (7 F. R. 3153), issued under the Emergency Price Control Act, as amended (56 Stat. 23, 50 U. S. C. App. Sec. 901, et seq.).

JURISDICTION

Jurisdiction of the District Court was invoked under Section 205 (*c*) of the Act. The jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. C. Sec. 225). The judgment was entered on December 14, 1944 (R. 20–22). A motion for rehearing and to amend the findings of fact, con-

clusions of law and judgment was filed on December 26, 1944 (R. 22–25) and was granted on February 2, 1945 (R. 27–31). Amended findings of fact and conclusions of law were filed on February 12, 1945 (R. 31–37). An amended judgment was filed on the same day (R. 37–39). Notice of appeal was filed on May 10, 1945 (R. 39).

STATUTES AND REGULATIONS INVOLVED

The action involves the Emergency Price Control Act of 1942, as amended, and the General Maximum Price Regulation issued thereunder. The pertinent sections of the Act are (Sections 2 (a), 203, 204 and 205 (a)) and the pertinent provisions of the Regulation are (Sections 2, 3 (a), 3 (c) and 12). None of the issues on this appeal turn upon a construction of either the Act or the Regulation. The following is, however, a brief resumé of the more important provisions of each:

Briefly, Section 2 (a) of the Act authorizes the Price Administrator to issue orders or regulations establishing maximum prices for commodities; Sections 203 and 204 prescribe the procedure by which the constitutionality and statutory validity of such orders and regulations may be tested; and Section 205 (a) provides for the enforcement of such orders by a suit in equity.

The Regulation was issued under Section 2 (a) of the Act and establishes maximum prices for all commodities not covered by other regulations or specifically excepted. Section 2 of the Regulation prescribes a series of 12 mutually exclusive pricing rules, to be applied in sequence, for determining the maximum price of a commodity. These rules are applicable only

where the same or a similar commodity was sold or offered for sale by the same seller or his closest competitor in March 1942. If none of these rules is applicable, then Section 3 (a) of the Regulation directs that the maximum price is to be determined by applying a prescribed formula. The price so determined must be promptly reported to the Office of Price Administration. Section 3 (c) of the Regulation provides that if the maximum price of any commodity cannot be determined by any of the foregoing methods, it shall not be sold until the seller has first submitted a proposed price to the Office of Price Administration, and that office has approved the proposed price, or has fixed another or has failed to act within 20 days. Section 12 of the Regulation requires every person selling any commodity subject to the regulation to prepare and keep records showing both the prices currently charged by him, and the manner in which his maximum prices were determined.

STATEMENT OF FACTS

Defendants are co-partners who since October 1942 have been engaged in the wholesale furniture business in the course of which they sold various commodities subject to the General Maximum Price Regulation (R. 8–9). Alleging that the defendants had violated the Regulation (a) by failing to keep the records required by Section 12, (b) by failing to compute their maximum prices as required by Section 2 of the Regulation, and (c) by failing to make the reports required by Section 3 (a) of the Regulation, the Administrator brought this suit to enjoin the defendants from continuing to violate the Regulation (R. 4–5). The defendants answered denying the material allegations of

the complaint and pleading, as a defense, good faith and inadvertence. After trial on the merits, the court found that the defendants had violated the regulation by failing to prepare and keep the records required by the Regulation, and by failing to determine the maximum prices for the commodities sold by them in accordance with the rules and formulas prescribed by the Regulation (R. 12, 14–17).

On the basis of these findings the court below entered a judgment commanding defendants to comply with the requirements of Sections 3 (c) and 12 of the Regulation and permanently enjoining them "from selling, delivering, transferring or offering to sell, deliver or transfer commodities at prices in excess of the prices permitted by the General Maximum Price Regulation as heretofore *or hereafter amended, or any other regulation promulgated by the Office of Price Administration governing the maximum prices*" of the particular commodities involved, and "from doing or omitting to do any other act in violation of the General Maximum Price Regulation *as heretofore or hereafter amended*" (R. 20–21).

Subsequently, on motion of the defendants, the court struck from the judgment the first group of words italicized above, and substituted for the second group of words italicized above the words "in effect at the time of filing this action" (R. 29).

SPECIFICATION OF ERROR

The court erred in restricting the injunction to violations of the Regulation as it read at the time of the filing of the action.

ARGUMENT

I

The judgment was not amended in the exercise of discretion but because of an error of law which should be corrected on appeal

It is clear from the order amending the judgment that it was not made in the exercise of discretion. On the contrary, it was made because the court was of the opinion that if the injunction were to include future amendments to, and substitutions of, the regulation, the defendants would be deprived of their right to challenge the validity of such amendments and substitutions in the Emergency Court of Appeals.[1] As we shall develop later, this was a clear error of law. Such an error is reviewable and will be corrected on appeal. For, while an appellate court will not interfere with a trial court's exercise of discretion in the absence of a showing it has been improvidently exercised, nevertheless, where it is clear that the trial court acted on a mistaken conception of the law or pertinent facts, an appellate court will not hesitate to correct the error. *Union Tool Company* v. *Wilson,* 259 U. S. 107;

[1] Thus the court in the order amending the judgment said:

"It is the opinion of the Court that to require the defendants to be bound by, or to require the defendants to be subject to, penalties for the violation of 'any other act in violation of the regulations' or for 'offering, soliciting, attempting or agreeing to do any of the foregoing,' or to compel defendants to be bound by any future regulation, *would deprive the defendants of their day in court, and would be a denial of the right of the defendants if the Court found that in good faith they should be permitted to attack a regulation before the Emergency Court of Appeals;* in all other respects the Findings of Fact, Conclusions of Law and the judgment are affirmed." [Italics supplied.] (R. 30.)

Bowles v. *Simon,* 145 F. 2d 334 (C. C. A. 7th, 1944); *Peterson* v. *John Hancock Mutual Life Ins. Co.,* 116 F. 2d 148 (C. C. A. 8th, 1940); *Home Owners Loan Corp.* v. *Huffman,* 134 F. 2d 314 (C. C. A. 8th, 1943).

II

The original decree did not deprive defendants of their right to challenge the validity of future amendment to and substitutions of the regulation in the Emergency Court of Appeals

In assuming that if the injunction embraced future amendments to, and substitutions of, the Regulation the defendants would be deprived of their opportunity to contest the validity of such amendments and substitutions, the trial court was clearly in error.

The Emergency Price Control Act of 1942, as amended by the Stabilization Extension Act of 1944, provides two procedures whereby the constitutionality or statutory validity of orders and regulations establishing maximum rents and prices may be judicially reviewed. The first may be resorted to as of right; the second may be resorted to only with the permission of a court in which a proceeding to enforce the order or regulation is pending, which permission may be granted or withheld by the court in the exercise of a sound judicial discretion.

The first procedure is provided by Sections 203 and 204 (a)–(d) of the Act. Under this procedure any person subject to any provision of any regulation, or order promulgated under the Act may at any time file a protest with the Administrator setting forth any such protest. If the protest is denied in whole or in part, the protestant may file an action in the Emer-

gency Court of Appeals, which, if it determines that the provision is arbitrary, capricious or not in accordance with law, may set the order or regulation aside. Cf. *Lockerty* v. *Phillips,* 319 U. S. 182; *Yakus* v. *United States,* 321 U. S. 414; *Bowles* v. *Willingham,* 321 U. S. 503.

The second procedure for testing the validity of an order or regulation issued under the Act is provided by Section 204 (e) of the Act, which was added by the Stabilization Extension Act of 1944. Under this procedure the defendant against whom a civil or criminal proceeding has been brought under Section 205 to enforce any provision of any order or regulation issued under the Act may apply to the court in which such proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to any provision which the defendant is alleged to have violated. The court may grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with Section 203 (a). If the proceeding is one to enjoin the defendant from violating the order or regulation, a temporary restraining order must issue enjoining the defendant from violating the order while the validity of the order is being tested in the Emergency Court of Appeals. If the provision objected to is determined to be invalid, then the judgment in the enforcement proceeding must be vacated and the proceeding dismissed.

665286—45—2

From the foregoing it is clear that the first of the two procedures would always be available to the defendants to challenge the validity of any future amendments to, or substitutions of, the regulation. The court, therefore, was plainly in error in assuming that if the injunction were made to embrace such amendments and substitutions the defendants would be deprived of the opportunity of contesting their validity. This misconception of law is sufficient in and of itself to require a reversal of the judgment.

It is true that the second procedure would not be available to the defendants in any proceedings to punish them for contempt for violating the injunction. See *Taub* v. *Bowles,* 149 Fed. 817, and *Howat* v. *Kansas,* 258 U. S. 181. But the language of the statute, its legislative history, and indeed the whole statutory plan for the judicial review of maximum price and rent orders and regulations make it plain that that procedure should not be available except in rare and exceptional cases. As Judge Leamy said in *United States* v. *Aronin,* 57 F. Supp. 186, 191 (S. D. N. Y. 1944):

> Persons who are thus brought into Court by the Government for violation of the wartime inflation control measures should not be encouraged to regard the new stay procedure as an instrument for obstruction and delay or as a means of thwarting the just processes of the law. It could not have been the intention of Congress that the new stay procedure should develop into a means of frustrating the proper enforcement of wartime price controls, nor did Congress intend that stays under the new pro-

cedure should be available indiscriminately to all defendants who might take the trouble to file a petition setting forth mere pro forma grounds for a stay. Hence Congress surrounded the discretionary authority of the District Court in this regard with plain and strongly worded conditions as to the formulation and pertinence of "objections," and as to "good faith" challenges against the regulations, and convincing "excuse" for failure to invoke the regular statutory review procedure.

The legislative history makes it clear that Congress looked to the courts to prevent abuse of the new procedure and to insure that this procedure would operate in such a way as to give just treatment to deserving defendants, rather than in such a way as to cripple the Government's efforts to enforce these vital wartime controls.

The intent of Congress was clearly stated by Senator Wagner when he presented to the Senate the report of the Senate Conferees on the renewal Act:

"The Price Administrator has expressed great concern lest the right accorded by this procedure be abused by defendants resorting to protests and leaves to complain as a means of deferring or even avoiding the trial of criminal cases and of staying the execution of judgment in civil proceedings. But the procedure provided in the amendment does not represent a regular method to be followed in enforcement cases. Rather, it is an exceptional procedure which has been made available to avoid the risk of injustice that existed under the original act under which a defendant who had excusably

failed to file a protest within the strict time limits the act allowed, might be denied any opportunity to question the validity of the regulation which he was charged with violating. The remedial procedure prescribed by the conference committee is available only to defendants whose objections the courts find have been made in good faith, and not primarily for the purpose of delay. The committee is confident that the courts will be vigilant in administering the standards of good faith to deny stays to defendants who have not previously availed themselves of the unrestricted opportunity to protest but who have been violating the regulations on the gamble that, if caught, they could then protest and secure stays of proceedings which would afford them a good chance to avoid the trial or the execution of judgment." Cong. Rec. (Senate), 78th Cong., 2d sess., June 21, 1944, p. 6451.

It is apparent, then, that everything points to a strict and rigidly limited use of the new stay procedure. Enforcement actions under the Price Control Act should not be subjected by the new statute to the constant hazard of an automatic stay upon mere application by a defendant. A stay application, in order to be entitled to favorable action by a court, must have more to recommend it than the natural desire of every wrongdoer to postpone legal reckoning. We have the strictly conditional terms of the statute as an explicit Congressional declaration of just what showing a defendant must make in order to recommend himself to a court under the new stay provisions, and where the defendant cannot meet these conditions

clearly and substantially, it would be an abuse of authority if the application was not denied.

The defendant's application for leave to present objections against Maximum Price Regulation No. 178 in the statutory review forum, and for a stay of further proceedings in this case is denied.

As shown by the foregoing decision, which has been cited and followed by every district court to which an application to invoke the second procedure has been presented, that procedure was not intended to be available to one who fails to act in good faith and with the utmost diligence. Warned as they are by the injunction of their duty to obey and abide by the regulation, defendants would not be acting in good faith or with diligence should they fail promptly to invoke their remedy under the first procedure in respect to any future amendment or substitution which they consider to be invalid. Therefore, even if the injunction did not embrace future amendments and substitutions, defendants would not be entitled to invoke the second procedure in any proceeding brought to enforce such amendments and substitutions, for the simple reason they would not be able to make the necessary showing. Assuming that they could make the necessary showing, which seems inconceivable, then, if the injunction embraced such amendments and substitutions, while the statutory provision creating the second procedure would be inapplicable, the court, in the exercise of its inherent powers, could continue any contempt proceedings while the validity of such amendments and substitutions are being tested under the first procedure. *Landis* v. *North American Company,* 299 U. S.

248. It is true that the defendants would not be entitled to such a continuance as of right, but neither would they be entitled to invoke the second procedure as of right. Whether a continuance of contempt proceedings should be granted and whether a defendant in an enforcement proceeding other than a contempt proceeding should be permitted to invoke the second procedure are both matters which rest in the sound discretion of the court.

Admittedly, if the injunction were made to embrace future amendments and substitutions, the defendants would be required to obey them while their validity is being tested under the first procedure, but the same would be true if the second procedure were available to the defendants. Section 204 (e) expressly provides that as a condition to granting leave to invoke the second procedure, the court shall issue a temporary restraining order enjoining the defendant from violating the regulation while its validity is being tested. Defendants, therefore, are in no position to complain of the nonavailability of the second procedure, and the nonavailability thereof is not a valid ground for restricting the injunction so as to exclude future amendments and substitutions.

III

The Court erred in restricting the injunction to the regulation as it read when it was issued

The General Maximum Price Regulation, which is the regulation involved in this action, was promulgated on April 28, 1942 to cover, with certain specified exceptions, all commodities and services subject to regu-

lation under the Act. The issuance of such a comprehensive regulation was necessary in order to impose immediately an over-all ceiling on the entire economy before special studies of the various industries and trades permitted the issuance of price regulations for specific commodities and services. Since then, 592 maximum price regulations have exempted from the General Maximum Price Regulation numerous commodities and services, and subjected them to specific price controls. At any time it may be necessary to take the same measure with regard to the commodities involed in this action. In addition, the text of the General Price Regulation itself has been modified by 65 amendments since its original promulgation.

These numerous changes were and are unavoidable in view of the fact that price control covers the entire economy of the nation at a period of profound economic wartime dislocations. As economic conditions change almost from day to day, maximum price regulations and especially the basic General Maximum Price Regulation must be constantly amended in order to preserve at all times a price level that is "generally fair and equitable" as required by the Act. This necessity for the constant revisions of price regulations has been judicially recognized. Indeed it must be self evident. In *Bowles* v. *May Hardwood Company,* 140 F. 2d 914, Judge Simon, speaking for the Circuit Court of Appeals for the Sixth Circuit, said:

> * * * If, in the complexity of a price ceiling on hundreds or thousands of varying kinds and grades of commodities, which from period

> to period must be revised to meet continuing changes in economic conditions, demand and supply, the effect of weather, labor supply and other elements of production, past derelictions will not support injunctive restraint of similar or related acts. Section 205 (a) is rendered completely nugatory, as a means of enforcing the Act, and traders may not be brought into subordination of a regulation, except by a myriad of injunction suits, each limited to a particularized grade or species of a general classification, and based upon violation of the regulation only in respect to such grade or species.

These facts make it absolutely necessary, as the foregoing language of the Circuit Court of Appeals clearly implies, for an injunction compelling obedience to a price regulation to embrace future amendments to, and substitutions for, the regulation. To restrict the injunction to the regulation as it read when the action was instituted would not only free the defendants from restraint from violating provisions of the regulation which may be strengthened or made more stringent in the future, but it would also require them to obey provisions thereof which may be relaxed, and would thus be unfair both to the Government and to the defendants.

Injunctions dealing with future contingencies have frequently been upheld by the courts. Thus, in *Bitterman* v. *Louisville & Nashville Railroad Company*, 207 U. S. 205, 28 S. Ct. 91 (1907), dealers who had customarily purchased and resold the return portions of nontransferable reduced round-trip tickets were enjoined by the district court from continuing such deal-

ings with regard to two specific forthcoming ticket issues only. The Circuit Court of Appeals enlarged the lower court's decree to make it cover all future ticket issues of that class. In upholding the appellate court's action, the Supreme Court held (99):

> * * * It is insisted that the circuit court of appeals erred in awarding an injunction as to dealings "in nontransferable tickets that may be hereafter issued * * * since it thereby undertook to promulgate" a rule applicable to conditions and circumstances which have not yet arisen, and to prohibit "the petitioners from dealing in tickets not *in esse* * * * and is, therefore, violative of the most fundamental principles of our government." But when the broad nature of this proposition is considered, it but denies that there is power in a court of equity in any case to afford effective relief by injunction. Certain is it that every injunction, in the nature of things, contemplates the enforcement, as against the party enjoined, of a rule of conduct for the future as to the wrong to which the injunction relates. * * *

Similarly, injunctions have issued extending to future tariffs in *New York, New Haven & Hartford Railroad Company* v. *Interstate Commerce Commission,* 200 U. S. 361, 26 S. Ct. 272 (1906); and to future resale prices in *Calvert Distilling Co.* v. *Brandon* (W. D. S. C. 1938), 24 F. Supp. 857, and in *Calvert Distillers Corp.* v. *Stockman* (E. D. N. Y. 1939), 26 F. Supp. 73.

While the precise issue presented by this appeal has never before been litigated as such in any case arising

under the Act, injunctive decrees of equal or greater scope have been issued in numerous cases.

Thus, in *Bowles* v. *Augustine,* 149 F. 2d 93, (C. C. A. 9th, 1945), where the defendant had sold meat at over-ceiling prices, this Court upheld an injunction restraining his from

> * * * selling or offering for sale * * * at prices in excess of those established by RMPR Nos. 169 and 148, both as amended * * * or otherwise violating or attempting to do anything in violation * * * of any Regulation or Order adopted pursuant to the Emergency Price Control Act of 1942, establishing maximum prices for any of said meat items.[2]

In *Taylor* v. *Bowles,* 147 F. 2d 824, (C. C. A. 9th, 1945), this Court affirmed an injunction against defendants, who had violated the maximum rent, the eviction, and the reporting provisions of Maximum Rent Regulation No. 28. This order restrained them from

> * * * otherwise violating or attempting or agreeing to do anything in violation of said Maximum Rent Regulation as heretofore or hereafter amended or extended or * * * any other regulation or order relating to rent for housing accommodations heretofore or hereafter adopted pursuant to said Act as heretofore or hereafter amended or extended.

In thus upholding an order extending even to future amendments of the Act itself, this Court recognized

[2] The same order covering all present and future regulation of the commodity involved was issued in *Bowles* v. *Newman and Korn, Inc.*, (N. D. Cal., 1944), not reported.

the necessary continuity and unity of the entire system of wartime price control.

In another recent case arising under the Regulation, *Bowles* v. *Sanden and Ferguson,* 149 F. 2d 320, (C. C. A. 9th, 1945), this Court ordered the entry of an injunction covering all regulations issued under the Act. In reversing the lower court's dismissal of the action, this Court ordered that an injunction be entered restraining defendants from

> * * * selling * * * or offering for sale * * * any commodity in violation of the General Maximum Price Regulation as heretofore or hereafter amended or revised, and attempting or agreeing to do anything * * * in violation of any regulation adopted pursuant to said Section 2 (a) of the Act.

Similar decrees extending to future amendments and regulations were issued in so many cases as to have become the norm. Only a few of the more important decisions are listed in the footnote.[3]

The clause extending the injunctions to future amendments to and substitutions of the regulation was, therefore, not only proper and customary, but absolutely necessary, and it was error to eliminate it from the original decree.

---

[3] *Bowles* v. *Simon*, 145 F. 2d 334 (C. C. A. 7th, 1944); *Bowles* v. *Heinel Motors* (C. C. A. 3rd, June 13, 1945) not yet reported, affirming *Bowles* v. *Heinel Motors*, 59 F. Supp. 759 (E. D. Pa., 1944); *Bowles* v. *Montgomery Ward and Co.*, 147 F. 2d 858, (C. C. A. 7th, 1944); *Brown* v. *Mars, Inc.*, 135 F. 2d 843, cert. denied, 320 U. S. 798 (C. C. A. 8th, 1943); *Henderson* v. *Burd*, 133 F. 2d 515 (C. C. A. 2d 1943); *Bowles* v. *Sisk*, 144 F. 2d 163, (C. C. A. 4th, 1944).

CONCLUSION

It is respectfully submitted that the judgment should be reversed, and the cause remanded with direction to reenter the original decree.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
DAVID LONDON,
Chief, Appellate Branch,
KARL E. LACHMANN,
Attorney,
Office of Price Administration,
Washington 25, D. C.

HERBERT H. BENT,
Regional Litigation Attorney,
H. EUGENE BREITENBACH,
District Enforcement Attorney,
WM. U. HANDY,
Litigation Attorney,
Office of Price Administration,
Los Angeles, California.

U. S. GOVERNMENT PRINTING OFFICE : 1945

No. 11,074.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellant,

vs.

M. R. LUSTER and A. M. LUSTER, individually and as co-partners, doing business as Sunbeam Furniture Sales Co.,

Appellees.

APPELLEES' REPLY BRIEF.

SAMUEL A. MILLER,
ABE F. LEVY,
700 Lane Mortgage Building, Los Angeles 14,
Attorneys for Appellees.

The Myers Legal Press, Los Angeles, Phone MUtual 4961

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

Cases.

Statutes.

Textbooks.

No. 11,074.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellant,

vs.

M. R. LUSTER and A. M. LUSTER, individually and as co-partners, doing business as Sunbeam Furniture Sales Co.,

Appellees.

APPELLEES' REPLY BRIEF.

Jurisdictional Statement.

The United States District Court for the Southern District of California assumed jurisdiction of the cause under Section 205(c) of the Emergency Price Control Act, as amended (45 Stat. 23, 50 U. S. C., App., Sec. 901, *et seq.*). The jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit is invoked under Section 128 of the Judicial Code (28 U. S. C., Sec. 225).

Statutes and Regulations Involved.

Appellant's Brief, page 9, sets forth in detail the Statutes and Regulations involved in this action.

Statement of Facts.

The Statement of Facts as set forth in Appellant's Opening Brief (p. 3) is substantially correct. However, it should be noted that upon the trial the evidence showed that the defendants and appellees had, after the Office of Price Administration had called their attention to it, prepared a set of records which they thought were in substantial compliance with Section 1499.12 of the General Maximum Price Regulation. These records gave a full description of each item, indicated where it was bought and futher indicated the competitor with whom the defendants had compared their individual item in order to arrive at a selling price. [Defendants' Exhibits A to P, incl.]

The Court below found that these records did not show "as precisely as possible the basis on which they determined their maximum prices for said household furniture and miscellaneous commodities which they sold as wholesalers subsequent to October 1, 1942." [Tr. R. 35.] In accordance with its findings the Court issued a restraining order and injunction, in effect calling upon the defendants to improve their methods of pricing and to more clearly indicate the basis upon which their maximum prices had been arrived at.

Appellant submitted to the Court the findings of fact and conclusions of law. Upon motion made by the appellees the Court ordered said findings of fact and conclusions of law amended by excluding the portion italicized below:

> "2. Selling, delivering or offering to sell or deliver said commodities at prices in excess of the maximum prices established therefor by the Regulation, *or by any other regulation establishing maximum prices for said commodities;* and

3. Doing or omitting to do any other act in violation of the Regulation *or of any other regulation establishing maximum prices for said commodities;* and

4. *Offering, soliciting, attempting or agreeing to do any of the foregoing."*

The Court further ordered the judgment amended as set forth in Appellant's Brief, page 4.

I.

No Error of Law Was Committed by the District Court in Amending the Judgment. The District Court, in Amending the Judgment, Exercised Its Discretion in Permitting Defendants to Challenge the Validity of Future Amendments to the General Maximum Price Regulation in the Emergency Court of Appeals. The District Court Thought It Proper to Permit Defendants to Challenge the Validity of Said Amendment Either by the Procedure Provided for Under Sections 203 and 204 (e to d) of the Act or Under the Procedure Provided for in Section 204(e) of the Act.

It is admitted that an error of law committed by the trial court is reviewable and will be corrected on appeal. However, an examination of the "Order of Court Amending Findings of Fact, Conclusions of Law and Judgment" filed December 14, 1944 [Tr. R. 27] reveals that the basis for the Court's order amending the judgment was not, as contended by appellant, the fact that the Court thought that its original action would have deprived defendants of the right to challenge the validity of any amendments or additions to the General Maximum Price Regulation, but rather the order of the Court was based on the evidence as presented at the trial; which was

that the defendants had made in good faith and honest attempt to comply with the regulation, had established a set of records and had sought to show the basis upon which they priced. It is apparent from a reading of the Order that the Court was of the opinion that, in the proper exercise of its discretion, it had power to leave open to the defendants in any future action which might arise (which the Court felt would not happen in view of the evidence presented at the trial) the right to challenge the validity of future amendments to the regulation not only by the procedure outlined in Sections 203 and 204 (a) to (d) of the Act, but also by the second procedure provided for in Section 204 (e) of the Act. The Court felt that were the defendant to be prosecuted again by the Office of Price Administration and were this prosecution based on an unintentional, minor and undamaging violation of the Act that the defendants should have the right to request the District Court for permission for leave to file with the Emergency Court of Appeals a complaint against the Administrator, setting forth objections to any provision which the defendants were alleged to have violated. This is indicated by the language used in the order:

> "If future violations are found to occur by the plaintiff another action can be instituted. It is not the policy of this court to keep defendants in a state of suspended animation or hold above their heads the Sword of Damocles which may fall at any move, not knowing when they will be brought into Court on contempt proceedings for violation, real or alleged." [Tr. R. 30.]

A reading of the Order made by the District Court will indicate that the Court was at all times aware that were

it to issue the broad injunction requested by the appellant that the defendants would be deprived of the privilege granted under the second procedure. The Court exercised its discretion to permit the defendants the use of the second procedure *per se* without the necessity of requesting a continuance in a possible contempt procedure. Appellant states (Appellant's Br. p. 11) that the second procedure "was not intended to be available to one who fails to act in good faith and with the utmost diligence;" and further, "Therefore, even if the injunction did not embrace future amendments and substitutions the defendants would not be entitled to invoke the second procedure in any proceeding brought to enforce such amendments and substitutions for the simple reason that they would not be able to make the necessary showing." (App. Br. p. 11.) It is conceivable that the defendants could well act in good faith and with full intent to comply with the requirements and obligations imposed by any future amendments to the regulation, and still be in technical violation of said amendments. The court below foresaw this possibility and, being of the opinion that the defendants were not intentional violators, chose to restrict the injunction and to close the case so as to permit defendants to invoke a defense of good faith in any future action in requesting a continuance in order that they might file a protest with the Emergency Court of Appeals. The Court was of the opinion that it did not wish to place the defendants in the position of being in automatic contempt of an injunction decree while the defendants were possibly contesting the validity of any future amendments in the Emergency Court of Appeals. If the Court had been of the opinion that the defendants' violation was intentional, gross and calculated it is conceded that it could have well made the injunction as broad

as it desired so as to include any future amendments issued to the regulation in order to assure that the defendants would comply with the regulation. However, the Court was of a different opinion in this case and in the use of its discretionary power, after hearing the evidence, made the injunction a limited one.

II.

The Judgment Was Amended in the Exercise of Discretion by the District Court. The District Court in the Proper Exercise of Its Discretion Had Power to Make the Injunction as Broad or as Narrow as It Saw Fit.

Granting or refusing of injunctive relief rests within the jurisdictional discretion of the trial court and its action in the matter will be substantiated on review by an appellate court where the power has not been abused.

U. S. v. Corrick, 298 U. S. 435, A 80 L. Ed. 1263;

Continental Illinois Bank v. Chicago R. I. & P. R. Co., 294 U. S. 648, 79 L. Ed. 1110;

Rogers v. Hill, 289 U. S. 582;

Alabama v. U. S., 279 U. S. 229;

28 *Am. Jur.* 500.

It is well settled that in these cases the Court may exercise its discretion broadly and the exercise of discretion should be based upon the evidence appearing upon trial of the cause.

As the Supreme Court said in *Hecht v. Bowles*, 321 U. S. 321, 328, 64 S. Ct. 587:

> "It appears apparent on the face of Section 205(a) that there is some room for exercise of discretion on the part of the Court,"

and further, at page 329:

> "The historic injunctive process was designed to deter, not to punish. The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."

and at page 330:

> "Hence we resolve the ambiguities of Section 205 (a) in favor of that interpretation which affords a full opportunity for equity courts to treat enforcement proceedings under this emergency legislation in accordance with their traditional practices, as conditioned by the necessities of the public interest which Congress has sought to protect. U. S. v. Morgan, 307 U. S. 183, 194 and cases cited."

The extent to which the discretion of the Court may be exercised in granting or refusing to grant an injunction, or even in limiting the terms and applicability of the terms if granted, is well illustrated in *Bowles v. Town Hall Grill,* 145 Fed. (2d) 680 (C. C. A. 1st), wherein the Office of Price Administration sought an injunction to restrain the defendant from selling *any* food items in excess of prices established by the General Maximum Price Regulation. However, the Court felt that this type of injunction would not be applicable to the particular case, and in the exercise of its discretion limited the injunction to restraining the defendant from selling "any food in which lobster and poultry or both are the chief ingredients and beverage items in which gin is the chief ingredient" in excess of ceiling prices (p. 681).

The Court stated therein:

> "It seems to us too evident to warrant discussion that when the District Court said that in its *'opinion'* the injunction granted should be a limited one it was exercising its discretion." (Italics added.)

It should be noted that in the instant case the District Court based its limitation of the injunction upon its "opinion" that to require defendants to be bound by the regulation and all future amendments thereto would constitute a hardship on the defendants not warranted by the facts. The Court further exercised its discretion in refusing to retain jurisdiction of the cause because of its "opinion" that based upon the facts that defendants should not "be kept in a state of suspended animation." [Tr. R. 30.]

In *Bowles v. Town Hall Grill (supra)* the Circuit Court, in following *Bowles v. Hecht (supra)*, characterized the power of the trial court in entering these decrees under the Emergency Price Control Act as follows:

> "Now it seems clear to us that if under Section 205(a) a District Court has power in its discretion to deny injunctive relief altogether under some circumstances, and has power to mould its decrees to fit the necessities of particular situations as they arise, and if equity is distinguished by flexibility rather than rigidity so that it may function as the instrument for nice adjustment and reconciliation between competing public interest and private needs, a District Court sitting in Equity must have power, if it decides to enjoin, to grant only a limited injunction when circumstances warrant such action. To hold otherwise

would be to fly in the face of traditional equity practices which the Supreme Court has said Congress did not intend to alter when it enacted the Emergency Price Control Act of 1942." (P. 682.)

And:

". . . the scope of injunctive relief in cases of this sort is discretionary and that on the record before us there appears no abuse of discretion in giving only limited relief."

In a decision applicable to the facts herein, this Court stated that a District Court may in its discretion withhold an injunction under the Emergency Price Control Act of 1942 (50 U. S. C. A., App., 901 *et seq.):*

"To prevent in the future that which in good faith has been discontinued before the commencement of a suit, in the absence of any evidence will, or is likely to be repeated in the future."

Bowles v. Huff, 145 Fed. (2d) 428, 431 (C. C. A. 9th).

In *Bowles v. Socher,* 145 Fed. (2d) 186 (C. C. A. 2d), the Office of Price Administration sought to obtain an interlocutory injunction restraining defendant from

". . . doing or omitting to do any other act in violation of said regulation as *heretofore* or *hereafter amended.*" (Italics added.)

The District Court declined to issue an injunction so worded and the Circuit Court of Appeals on appeal held that it was a proper exercise of discretion on the part of the District Court to refuse to issue such a broad injunc-

tion. This case would seem to be directly in point upon the problem of whether or not the refusal of the District Court to issue an injunction in the terms originally requested by plaintiff and appellant herein is an error of law.

In the *Socher* case the Circuit Court of Appeals for the Second Circuit ruled that the lower court's refusal to issue this type of an injunction was not a matter of law and the breadth of the injunction was a matter for the trial court's discretion.

In *Bowles v. May Harwood Co.*, 140 Fed. (2d) 914 (C. C. A. 6th), cited by appellant (App. Br. p. 13), the Court drew a distinction between the past acts of the defendant showing a tendency to violate present regulations, in which event an injunction will and should be issued to restrain defendant from violating the regulation and future amendments thereto, and present acts by the defendant indicating a tendency to violate future possible regulations, wherein an injunction will not and should not be issued. The Court states:

> "If by this prayer, he (the Administrator) seeks to restrain violation of price ceilings not presently established by existing regulations and so to restrain acts which, though presently lawful may in the future become unlawful by reason of Administrative regulations hereafter adopted, the injunction sought manifestly is too broad, for courts will not restrain future acts when there is no factual basis for determining whether such acts are closely related to or of the same character as the unlawful acts which form the basis of the complaint."

It is submitted that the lower court herein followed the decision in the *May Hardwood Co.* case in refusing to re-

strain the defendants from violating future possible amendments to the General Maximum Price Regulation, for it appeared at the trial that there was no factual basis, nor did there exist a logical probability, that based upon the defendants' past violations of the General Maximum Price Regulation that the defendants would be inclined to violate future amendments to the General Maximum Price Regulation.

III.

The District Court in the Proper Exercise of Its Discretion Could Limit the Injunction if It Found That the Defendants Had Acted in Good Faith or Had Ceased and Discontinued the Complained of Practices.

A review of the evidence presented upon the trial discloses that the defendants herein at all times acted in good faith and desired to comply with the regulation. With this in mind it is well settled that the court below acted within its jurisdictional power to limit the injunction to the terms specified. See:

Bowles v. 870 Seventh Avenue Corp., 150 Fed. (2d) 819, 822-823;

Bowles v. Lake Lucerne Plaza, Inc., 148 Fed. (2d) 967, 970 (C. C. A. 5th).

If the Court was of the opinion that the defendants once apprised of their incorrect methods of keeping records under Section 1499.12 (a) of the General Maximum Price Regulation would correct said records and bring them into line with the requirements of the regulation, it had the power to either limit the injunction or refuse to grant it altogether.

"An injunction is a relief granted to prevent future misconduct. It does not issue to prevent a practice which has been definitely and permanently discontinued."

Bowles v. Carnegie-Illinois Steel Corp., 149 Fed. (2d) 545, 547.

See, also:

Industrial Association v. U. S., 268 U. S. 64, 45 S. Ct. 403;

Walling v. T. Buettner & Co., 133 Fed. (2d) 306 (C. C. A. 7th);

Shore v. U. S., 282 Fed. (2d) 857 (C. C. A. 7th);

28 *Am. Jur.* 201.

In *Bowles v. Arlington Furniture Co.,* 148 Fed. (2d) 467 (C. C. A. 7th), the Circuit Court said in upholding the District Court's refusal to issue an injunction to enjoin sales above ceiling prices:

"We think it is plain that the acts referred to in these findings were wholly consistent with good faith and a desire on the part of the parties to comply with the regulation and not to violate it. Due to the uncertain and confused situation with which they were confronted, they took such measures as honest and prudent men would take under like circumstances to protect themselves; for this they should not be condemned."

This decision indicates the latitude permitted trial courts in these cases.

IV.

Appellant's Treatment of Bowles v. Augustine, Bowles v. Sanden & Ferguson and Bowles v. Simon Rejected.

An examination of the report of this Court's decision in *Bowles v. Augustine,* 149 Fed. (2d) 93 (C. C. A. 9th), fails to disclose that the Court, at any time, had before it for consideration the latitude and terms of the injunction issued by the District Court. A reading of the case discloses that the question of restricting defendants' acts, both as to present and future regulations issued for the control of prices on meat items, was not considered upon appeal. The sole question raised upon appeal and tried by the Circuit Court of Appeals for the Ninth Circuit was the constitutionality of Section 205 (a) of the Emergency Price Control Act.

Appellant seeks to compare the case of *Bowles v. Sanden & Ferguson,* 149 Fed. (2d) 320 (C. C. A. 9th), to the instant case. In that case this Court ordered that the injunction be broadened to restrict defendants from violating ". . . the General Maximum Price Regulation as heretofore or hereafter amended or revised . . ." (App. Br. p. 17.)

At page 321 therein this Court stated:

> ". . . the proof shows a complete disregard for the violations with no situation comparable to that of Hecht v. Bowles. . . . The judgment should be reversed and the case remanded to issue the injunction prayed for."

It is almost unnecessary to assert that the *Sanden & Ferguson* case *(supra)* does not create any precedent bind-

ing upon the trial court in the instant case, for it is apparent by a reading of the record herein that the defendants did not show "a complete disregard of the regulation." Nor does appellant anywhere claim that they did. Rather, the record shows, and the appellant does not deny, that the defendants herein made efforts to comply with the provisions of the regulation.

Similarly, appellant cites *Bowles v. Simon,* 145 Fed. (2d) 334 (C. C. A. 7th), in support of its contention that the Circuit Court will overrule an abuse of discretion by the trial court. But here again the facts of that case cannot, by the furthest stretch of the imagination, be compared to the facts in the instant case. The Court stated in the *Simon* case that:

> ". . . The defendant's uncooperative and hostile attitude toward the Price Control Act, its enforcement and administration, his repeated violations of the regulations governing rent increases and minimum services, and his flagrant disregard for all warnings of the Administrator, constrains us to hold that the District Court abused its discretion in refusing this injunction."

The record fails to disclose that the defendants herein were flagrant in their violations of the Act. It will rather show an honest, good faith attempt to comply with the Act.

Conclusion.

It is respectfully submitted that the judgment of the trial court should be sustained.

SAMUEL A. MILLER,
ABE F. LEVY,
Attorneys for Appellees.

No. 11089

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellant,

vs.

JAMES HENRY PACKING COMPANY, a Corporation,

Appellee.

JAMES HENRY PACKING COMPANY, a Corporation,

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

Rotary Colorprint, 661 Howard Street, San Francisco

No. 11089

United States
Circuit Court of Appeals
For the Ninth Circuit.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellant,

vs.

JAMES HENRY PACKING COMPANY, a Corporation,

Appellee.

JAMES HENRY PACKING COMPANY, a Corporation,

Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

Rotary Colorprint, 661 Howard Street, San Francisco

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index **Page**

Index Page

Index **Page**

NAMES AND ADDRESSES OF COUNSEL:

MESSRS. CHARLES I. DOBRIN and DANIEL M. REAUGH,

Attorneys for Appellant and Cross-Appellee,

3328 White-Henry-Stuart Building
Seattle, 1, Washington.

MR. ALMON RAY SMITH,

Attorney for Appellee and Cross-Appellant,

800 Northern Life Tower
Seattle, Washington

MR. HENRY CLAY AGNEW,

Attorney for Appellee and Cross-Appellant,

1103 Smith Tower,
Seattle, Washington [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

United States District Court for the Western District of Washington, Northern Division.

Civil Action—No. 884

CHESTER BOWLES, Administrator of the Office of Price Administration on behalf of the United States of America,

Plaintiff,

vs.

JAMES HENRY PACKING COMPANY,

Defendant.

COMPLAINT

Count I.

1. Plaintiff, as Administrator, Office of Price Administration, brings this action for treble damages on behalf of the United States, pursuant to the provisions of Section 2005 (e) of the Emergency Price Control Act of 1942 (Pub. Laws 421), 77th Con. 2nd Session 56 Stat. 23,) enacted January 30, 1942, hereinafter called "the Act".

2. Jurisdiction of this Act is conferred on this Court by Section 205 (c) of the Act and by said Section 205 (e) of the Act.

3. At all times herein mentioned, there has been in effect, pursuant to the Act, Maximum Price Regulation No. 169—Beef and Veal Carcasses and Wholesale Cuts, as amended (9 F. R. 1121), establishing a maximum price for the commodities enumerated in the title thereof.

4. At all times hereinafter mentioned, James

Henry Packing Company was a corporation engaged in business of selling beef and veal carcasses and wholesale cuts, as those terms are defined in the said Maximum Price Regulation No. 169, as amended, and the transactions hereinafter related took place within the jurisdiction of this court.

5. Notwithstanding the provisions of the said Maximum Price Regulation No. 169, as amended, the said James Henry Packing Company did, between the 8th day of July, 1943, and the 8th day of November, 1943, sell and deliver beef and veal carcasses and wholesale cuts to many purchasers, and receive payment therefor at prices in excess of the maximum legal prices fixed in the applicable Maximum Price Regulation; that the amount charged and received from each of said purchasers by the said James Henry Packing Company in excess of the maximum legal price, and the date of the receipt of the said excess, are shown in plaintiff's Exhibit A, attached hereto and by this reference made a part hereof as though fully set forth herein. The said purchasers who purchased the said beef and veal carcasses and wholesale cuts did so in the course of trade and business.

6. Treble the amount by which the considerations received in the said sales referred to in paragraph 5 above exceeded the applicable maximum prices, as established by the said Maximum Price Regulation No. 169 as amended, is the sum of $57,448.92.

Wherefore, plaintiff demands judgment on behalf of the United States against James Henry Packing Company in the sum of $57,448.92 and costs.

ROBERT C. FINLEY
District Enforcement Attorney
A. V. STONEMAN
Litigation Attorney [3]

STATEMENT OF PAYMENT REGULATION 169
AS AMENDED BEEF AND VEAL
CARCASS

EXHIBIT "A"

JAMES HENRY PACKING COMPANY
Seattle, Washington

Sheet 1 of 9

STATEMENT OF PAYMENTS IN EXCESS OF MAXIMUM LEGAL PRICES FIXED IN MAXIMUM PRICE REGULATION 169 AS AMENDED RECEIVED BY JAMES HENRY PACKING COMPANY FROM PURCHASERS OF BEEF AND VEAL CARCASSES AND WHOLESALE CUTS FOR THE PERIOD ENDING NOVEMBER 8, 1943

Account Number	Lessor	Date	Payments by Months During 1943					
			July	August	September	October	November	Total
1	Val Sonntag	July 14	$ 57.93					
		22	49.83					
		29	47.07					
		August 5		$ 47.95				
		13		45.14				
		23		44.17				
		30		46.17				
		September 3			$ 45.87			
		10			45.21			
		17			41.26			
		24			42.72			
		October 1				$ 33.55		
		5				31.69		
		15				31.82		
		22				33.28		
		29				32.91		
		November 8					$ 33.33	
			$ 154.83	$ 183.43	$ 175.06	$ 163.25	$ 33.33	$ 709.90
2	William Myers	July 20	$ 12.03					
		27	16.86					
		August 3		$ 17.95				
		10		15.83				
		17		14.07				
		24		16.26				
		31		14.76				
		September 8			$ 15.68			
		14			15.46			
		21			15.40			
		28			11.48			
		October 5				$ 11.00		
		12				10.35		
		19				8.62		
		26				9.60		
		November 2					$ 10.73	
			$ 28.89	$ 78.87	$ 58.02	$ 39.57	$ 10.73	$ 216.08
3	R. T. Anderson	July 13	$ 37.74					
		19	56.46					
		26	64.05					
		August 2		$ 66.55				
		9		62.80				
		16		65.10				
		23		64.05				
		30		64.65				
		Sept. 13			$ 71.25			
		13			56.80			
		20			67.35			
		28			45.43			
		October 4				$ 47.43		
		18				39.20		
		18				36.54		
		November 1					$ 37.80	
		1					50.50	
			$ 158.25	$ 323.15	$ 240.83	$ 123.17	$ 88.30	$ 933.70
4	S. L. Carstensen	July 13	$ 68.11					
		20	104.03					
		27	98.95					
		August 3		$ 108.12				
		10		81.10				
		17		83.83				
		24		86.43				
		31		84.82				
		September 8			$ 96.57			
		14			80.67			
		21			82.80			
		28			62.30			
		October 5				$ 65.59		
		12				53.76		
		19				58.73		
		26				54.04		
		November 2					$ 63.42	
			$ 271.09	$ 444.30	$ 322.34	$ 232.12	$ 63.42	$1,333.27

Exhibit "A"—(Continued)

Account Number	Lessor	Date	Payments by Months During 1943 July	August	September	October	November	Total
5	Guy R. Wilmont	July 14	$ 41.16					
		21	55.52					
		28	53.23					
		August 4		$ 59.32				
		11		55.82				
		18		55.76				
		26		55.98				
		September 1			61.70			
		8			59.78			
		15			54.50			
		22			55.64			
		29			37.91			
		October 6				$ 43.03		
		13				37.90		
		20				30.27		
		27				36.69		
		November 3					$ 37.99	
			$ 149.91	$ 226.88	$ 269.53	$ 147.89	$ 37.99	$ 832.20
6	Lindquist & Brown	July 13	$ 45.68					
		19	80.03					
		26	93.80					
		August 2		$ 102.29				
		9		92.74				
		16		89.73				
		23		97.53				
		30		92.74				
		September 7			$ 99.18			
		13			81.60			
		20			45.40			
		27			43.50			
		October 4				$ 48.17		
		11				40.46		
		18				44.00		
		25				44.00		
		November 3					$ 44.00	
			$ 219.51	$ 475.03	$ 269.68	$ 176.63	$ 44.00	$1,184.85
7	Thomas Mulholland	July 14	$ 19.02					
		21	20.67					
		28	15.46					
		August 4		$ 19.85				
		11		16.75				
		18		16.66				
		26		18.38				
		September 1			$ 15.93			
		8			14.26			
		15			13.80			
		22			12.23			
		29			8.18			
		October 6				$ 11.17		
		13				8.69		
		20				8.68		
		27				8.88		
		November 3					$ 9.86	
			$ 55.15	$ 71.64	$ 64.40	$ 37.42	$ 9.86	$ 238.47
8	Howard's Market	July 13	$ 54.55					
		20	68.33					
		27	67.11					
		August 3		$ 77.44				
		10		66.20				
		17		55.72				
		24		62.46				
		31		66.00				
		September 7			$ 79.17			
		14			61.58			
		21			57.16			
		28			47.17			
		October 5				$ 48.65		
		12				48.83		
		19				43.35		
		26				47.05		
		November 2					$ 40.00	
			$ 189.99	$ 327.82	$ 245.08	$ 187.88	$ 40.00	$ 990.77

Exhibit "A"—(Continued)

Account Number	Lessor	Date		Payments by Months During 1943 July	August	September	October	November	Total
9	Mary A. Klontz	July	13	$ 79.03					
			20	89.51					
			27	85.53					
		August	3		$ 93.68				
			10		87.20				
			17		86.28				
			24		87.18				
			31		94.12				
		September	8			$ 90.70			
			14			79.95			
			21			59.66			
			28			94.24			
		October	5				$ 69.08		
			12				61.83		
			19				64.81		
			26				62.87		
		November	2					$ 70.17	
				$ 254.07	$ 448.46	$ 324.55	$ 258.59	$ 70.17	$1,355.84
10	Paul Snyder	July	10	$ 62.56					
			19	69.13					
			26	52.84					
		August	2		$ 67.37				
			10		$ 48.35				
				$ 184.53	$ 115.72	.....	.....	.....	$ 300.25
11	John R. Marti	July	12	$ 28.78					
			19	42.29					
			26	43.04					
		August	2		$ 41.36				
			9		40.90				
			16		42.22				
			23		41.71				
			30		43.39				
				$ 114.11	$ 209.58	.....	.....	.....	$ 323.69
12	Becker Brothers	July	13	$ 101.03					
			20	125.38					
			27	129.46					
		August	3		$ 136.64				
			10		124.85				
			17		121.84				
			24		125.07				
			31		115.81				
		September	8			$ 123.03			
			14			108.84			
			21			108.46			
			28			79.44			
		October	5				$ 80.10		
			12				72.06		
			26				87.35		
		November	2					$ 98.55	
				$ 355.87	$ 624.21	$ 419.77	$ 239.51	$ 98.55	$1,737.91
13	Frank Blunden	July	12	$ 45.82					
			19	40.43					
			26	41.65					
		August	2		$ 33.50				
			9		41.86				
			16		49.74				
			23		45.62				
			30		45.52				
		September	7			$ 52.66			
			13			46.31			
			20			50.35			
			27			30.82			
		October	4				$ 35.37		
			11				28.93		
			18				30.98		
			25				30.46		
				$ 127.90	$ 216.24	$ 180.14	$ 125.74	.....	$ 650.02

Exhibit "A"—(Continued)

Account Number	Lessor	Date	July	August	September	October	November	Total
			Payments by Months During 1943					
14	Ray Parmenter	July 14	$ 45.22					
		21	79.30					
		29	80.85					
		August 4		$ 91.24				
		11		93.39				
		18		86.10				
		26		79.26				
		September 1			$ 84.72			
		10			89.89			
		15			72.18			
		24			80.26			
		29			81.32			
			$ 205.37	$ 349.99	$ 408.37	.....	.....	$ 963.73
15	Bungalow Grocery & Market (Phyllis Kelso)	July 16	$ 29.21					
		21	37.89					
		28	36.08					
		August 4		$ 40.66				
		26		69.18				
			$ 103.18	$ 109.84	.....	.....	.....	$ 213.02
16	Hans Thompson	July 16	$ 18.37					
		23	22.75					
		30	23.79					
		August 6		$ 22.64				
		13		23.46				
		20		22.35				
		27		19.35				
		September 3			$ 21.13			
		10			20.57			
		17			19.00			
		24			18.46			
		October 1				$ 12.98		
		12				13.67		
		12				11.55		
		22				11.62		
		29				11.56		
		November 5					$ 10.54	
			$ 64.91	$ 87.80	$ 79.16	$ 61.38	$ 10.54	$ 303.79
17	Joseph Barr	July 16	$ 47.74					
		21	83.95					
		28	91.89					
		August 5		$ 106.44				
		11		84.53				
		19		82.60				
		24		82.83				
		September 1			$ 82.62			
		10			70.98			
		15			59.64			
		24			68.33			
		29			31.39			
		October 5				$ 35.77		
		15				28.05		
		22				30.19		
		27				32.26		
		November 5					$ 30.77	
			$ 223.58	$ 356.40	$ 312.96	$ 126.27	$ 30.77	$1,049.98
18	Frank E. Mangan	July 13	$ 20.00					
		21	36.56					
		30	42.90					
		August 6		$ 46.83				
		11		32.67				
		19		34.28				
		26		28.68				
		September 3			$ 17.00			
		15			10.00			
		29			20.00			
		October 6				$ 10.00		
		15				10.00		
		22				10.00		
		29				10.00		
			$ 99.46	$ 142.46	$ 47.00	$ 40.00	.....	$ 328.92

Exhibit "A"—(Continued)

Account Number	Lessor	Date	Payments by Months During 1943 July	August	September	October	November	Total
19	Oscar Etten	July 14	$ 55.00					
		27	94.92					
		27	104.78					
		August 3		$ 71.97				
		11		83.29				
		17		59.86				
		21		18.36				
		September 8			$ 91.07			
		15			18.31			
		28			17.61			
		October 20				$ 82.82		
		26				25.64		
		November 2					$ 6.60	
			$ 254.70	$ 233.48	$ 126.99	$ 108.46	$ 6.60	$ 730.23
20	Thomas E. Stockley	July 10	$ 65.00					
		23	88.90					
		30	83.60					
		August 6		$ 82.40				
		13		79.45				
		19		69.80				
		27		62.40				
		Sept. 10			$ 123.30			
			$ 237.50	$ 294.05	$ 123.30	.....	.....	$ 654.85
21	Warren Meyer	July 19	$ 25.72					
		26	48.28					
		August 2		$ 50.70				
		9		47.29				
		16		48.40				
		23		49.08				
		30		54.74				
		September 7			$ 56.22			
		13			45.44			
		20			50.22			
		28			36.30			
		October 4				$ 42.77		
		11				33.73		
		18				37.22		
		25				35.53		
		November 1					$ 42.52	
			$ 74.00	$ 250.21	$ 188.18	$ 149.25	$ 42.52	$ 704.16
22	A. C. Marr	July 20	$ 14.73					
		27	40.90					
		August 6		$ 43.77				
		10		39.04				
		17		37.31				
		24		41.00				
		September 3			$ 43.80			
		7			47.51			
		14			38.94			
		21			42.35			
		28			29.71			
		October 5				$ 31.23		
		12				28.71		
		19				29.20		
		26				28.00		
		November 2					$ 30.91	
			$ 55.63	$ 161.12	$ 202.31	$ 117.14	$ 30.91	$ 567.11

Exhibit "A"—(Continued)

Account Number	Lessor	Date	Payments by Months During 1943 July	August	September	October	November	Total
23	William Vodarski	July 27	$ 87.50					
		August 3		$ 75.96				
		10		67.28				
		17		32.11				
		24		64.61				
		September 1			$ 46.59			
		8			51.32			
		14			42.10			
		21			50.79			
		28			42.92			
		October 5				$ 31.63		
		12				23.45		
		20				33.87		
		26				29.24		
		November 2					$ 36.23	
			$ 87.50	$ 239.96	$ 233.72	$ 118.19	$ 36.23	$ 715.60
24	Tom Miranti	July 26	$ 64.42					
		August 2		$ 99.16				
		9		76.69				
		16		77.04				
		23		88.58				
		30		81.11				
		September 7			$ 95.30			
		13			76.79			
		20			91.88			
		27			80.33			
		October 4				$ 38.34		
		11				53.85		
		18				52.76		
		25				51.39		
		November 1					$ 65.30	
			$ 64.42	$ 422.58	$ 344.30	$ 196.34	$ 65.30	$1,092.94
25	Richard Hartwig	July 26	$ 36.63					
		August 2		$ 79.69				
		9		83.60				
		16		77.16				
		23		79.17				
		30		80.35				
		September 7			$ 84.61			
		13			77.63			
		20			79.70			
		27			81.51			
		October 4				$ 32.79		
		11				55.60		
		18				57.11		
		25				57.17		
		November 1					$ 55.64	
			$ 36.63	$ 399.97	$ 323.45	$ 202.67	$ 55.64	$1,018.36
Total by Months for Period			$3,770.98	$6,793.19	$4,959.14	$2,851.47	$ 774.86	$19,149.64

[Endorsed]: Filed Feb. 29, 1944.

[Title of District Court and Cause.]

AMENDED ANSWER

1. Defendant admits the allegations of Paragraphs 1, 2 and 3 of Count I. of plaintiff's complaint.

2. Defendant admits the allegations of Paragraph 4 of Count I. of plaintiff's complaint, except that it denies that it was at the times therein mentioned engaged in the business of selling veal carcasses, and wholesale cuts thereof, and denies that the transactions in said paragraph referred to took place.

3. Defendant denies each and every allegation of Paragraph 5 of Count I. of plaintiff's said complaint.

4. Defendant denies the allegation of Paragraph 6 of Count I. of plaintiff's said complaint.

AFFIRMATIVE DEFENSES

1. Defendant alleges that the individuals named as lessors in Sheets 1 to 9, both inclusive, of Exhibit 'A,' attached to and made a part of plaintiff's said complaint, were each employees of the defendant during the times shown respectively in said Exhibit 'A' and that during said times the defendant sold no beef or veal to any of said individuals.

2. Defendant alleges that this action was brought under Section 205 (e) of the Emergency Price Control Act of 1942 in the name of Chester Bowles, Administrator of the Office of Price Administration, but not by said Administrator, and said

action was instituted without authority from said Administrator, and said Administrator has no right or discretion under the provisions of said Emergency Price Control Act of 1942, or any other law, to delegate his authority to bring such an action, nor did said Administrator attempt to delegate such authority to the persons who instituted said action, and the act of the [15] persons who instituted said action was without authorization in law or in fact.

Wherefore, defendant demands that the above entitled action be dismissed, and that it recover its costs.

ALMON RAY SMITH
HENRY CLAY AGNEW
Attorneys for Defendant.

Copy recd. Oct. 31, 1944.
C. E. HUGHES
Atty. for Plff.

[Endorsed]: Filed Nov. 14, 1944. [16]

[Title of District Court and Cause.]

STIPULATION

To reduce to the minimum the number of witnesses required for the trial of the above entitled action, the parties hereto stipulate as follows:

1. That paragraphs I., II. and III. of plaintiff's complaint are hereby admitted.

2. That James Henry Packing Company, defendant above named, is now, and was at all times mentioned in plaintiff's complaint, a corporation, engaged in the slaughter house and meat packing business at Seattle, Washington, selling at wholesale, meats and meat products, including beef, lamb, pork and wholesale cuts thereof to retail meat dealers at or near Seattle.

3. That during July 1943 said defendant executed with and delivered to each of 25 individuals hereinafter named two written instruments, one denominated 'Lease,' and the other denominated 'Contract of Employment.' A copy of the form of said instrument denominated 'Lease' is hereto attached and marked Exhibit 'A,' and made a part hereof; and a copy of the form of said instrument denominated 'Contract of Employment' is hereto attached and marked Exhibit 'B,' and made a part hereof. Said Exhibit 'A,' 25 in [17] number, are all identical except as to date, name, address and amount payable monthly. Said Exhibit 'B,' 25 in number, are all identical except as to date, name and address.

4. That at the time of, and for sometimes prior to, the execution of said Exhibits 'A' and 'B,' said individuals hereafter named owned and operated retail meat markets in and near Seattle, Washington, selling at retail, meats, consisting principally of beef, veal, pork, lamb and wholesale cuts thereof; also poultry and fish, and, in some instances, butter, eggs, cheese, fruit and vegetables;

and during said period said individuals bought from said defendant for their retail trade, beef, pork and lamb, and wholesale cuts thereof, and also ham, bacon and lard.

5. That at the time of the execution of said Exhibits 'A' and 'B,' and for sometime prior thereto, there was a scarcity of processed meats and meat products in and around Seattle, and retail meat markets generally were able to secure but small quantities thereof, and were, therefore, unable to adeqautely supply their trade, and, as a result, many retail meats markets suspended business.

6. That after the execution, and during the life, of Exhibits 'A' and 'B,' defendant delivered beef, lamb and pork, in wholesale cuts, and ham, bacon and lard, to said 25 markets for sale at retail, together with invoices covering each delivery showing the name of the individual retail market, the quantity in pounds of meat delivered and the wholesale price per pound with total price of each.

7. That each of the 25 individual markets hereafter named paid defendant for all meats delivered to said markets by the defendant between July 1st and November 8, 1943, during the life of said Exhibits 'A' and 'B,' the maximum price as fixed by Maximum Price Regulation No. 169, as amended; and, in addition thereto, [18] defendant received from said 25 markets during the life of said Exhibits 'A' and 'B' the sum of $19,149.64, said sum being a percentage of gross business of said 25 markets as provided in said Exhibit 'B.' An itemized statement of said payemnts is attached

to plaintiff's complaint, and marked Exhibit 'A' therein and is made a part hereof.

8. That the following is an itemized statement showing the names of the 25 individuals who signed Exhibits 'A' and 'B,' the dates of execution thereof and the amount of the monthly payment provided in Exhibit 'A.'

Name	Date of Exhibits 'A' and 'B'	Monthly Payments Provided in Ex. 'A'
1. Val Sontag	July 1, 1943	$30.00
2. Mary Klontz	July 2, 1943	30.00
3. Paul Snyder	July 2, 1943	35.00
4. Ray Parmenter	July 2, 1943	30.00
5. Becker Bros.	July 5, 1943	35.00
6. Lindquist & Brown	July 6, 1943	30.00
7. Frank Blunden	July 6, 1943	35.00
8. Thomas Mulholland	July 6, 1943	30.00
9. S. L. Carstensen	July 6, 1943	35.00
10. R. T. Anderson	July 6, 1943	25.00
11. Thomas E. Stockley	July 7, 1943	25.00
12. J. G. Paar	July 7, 1943	20.00
13. Frank E. Mangan	July 7, 1943	25.00
14. Howard Bosanko	July 7, 1943	30.00
15. Hans Thompson	July 7, 1943	25.00
16. Oscar Etten	July 7, 1943	25.00
17. Guy R. Wilmot	July 7, 1943	30.00
18. John R. Marti	July 7, 1943	20.00
19. Bungalow Grocery & Market	July 8, 1943	20.00
20. William Myers	July 14, 1943	25.00
21. Warren Meyer	July 16, 1943	25.00
22. Alfred C. Mar	July 16, 1943	20.00
23. Vodarski & Sparling	July 19, 1943	30.00
24. Tom Mirante	July 20, 1943	20.00
25. Richard F. Hartwig	July 22, 1943	35.00

9. That the leases from John R. Marti and Bungalow Grocery & Market were cancelled in August 1943 by mutual agreement, and all other

of said markets were operated under Exhibits 'A' and 'B' from their respective dates until on or about November 1, 1943, on which date defendant requested of each of said individuals that said exhibits be mutually rescinded as of that date; and defendant [19] thereafter treated said exhibits as cancelled as of that date and thereafter defendant received no benefits therefrom.

10. That said 25 individuals were unable to obtain from defendant an adequate supply of beef, pork, lamb and wholesale cuts thereof prior to the execution of said Exhibits 'A' and 'B.' That after the execution, and during the life, of said Exhibits 'A' and 'B,' said 25 markets received from defendant a much greater supply of said commodities.

11. Materiality of facts herein stipulated is not admitted by either party and either party may introduce evidence or additional facts not inconsistent with this stipulation.

Dated at Seattle, Washington, this 11th day of October, 1944.

GEORGE H. LAYMAN
C. E. HUGHES
Attorneys for Plaintiff
AMOS RAY SMITH
HENRY CLAY AGNEW
Attorneys for Defendant [20]

EXHIBIT 'A'

LEASE

This Lease made this.....day of July 1943 between ....., as lessor, and James Henry Packing Co., a corporation, as lessee; Witnesseth:

That the said lessor does by these presents lease and demise unto the said lessee, and the said lessee does hereby hire and take from the lessor those certain premises, property, and business located in the City of Seattle, King County, State of Washington, and described as follows:

> The meat market of the lessor at number ....., in the City of Seattle, Washington, including the leasehold interest of the lessor, and all furniture, fixtures, and equipment for the term of one (1) year from the .....day of....., 1943, to the .....day of....., 1944.

The rental to be paid to the lessor by the lessee shall be the sum of.....Dollars per month, payable monthly, and it is hereby agreed that if any rent shall be due and unpaid for a period of ten (10) days following any month of occupancy, then it shall be lawful for the lessor to reenter said premises and remove all persons therefrom, and the lessee does hereby covenant and agree to pay the lessor the said rent in the manner hereinbefore specified, and not to assign this lease, nor to sublet all or any part of the leased premises

without the written consent of the lessor; and it is mutually agreed that the interest of the lessee may not be transferred by operation of law through any execution sale, or bankruptcy or insolvency proceeding, and, at the expiration of said term, the lessee shall qiut and surrender the premises in as good state and condition as reasonable use and wear will permit, unavoidable damage excepted.

It is further agreed that said meat market may, at the election of the lessee, be operated under its present name.

Executed in Duplicate by the lessor and the lessee the day and year herein first above written.

.....

Lessor

JAMES HENRY PACKING CO.,

Lessee

By.....

President

State of Washington
County of King—ss.

On this.....day of....., 1943, before me, the undersigned, a notary public in and for the State of Washington, personally appeared ....., to me known to be the individual described in and who executed the foregoing instrument, and acknowledged said instrument to be his free and voluntary act and deed for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto signed my name and affixed my notarial seal the day and year in this certificate first above written.

.....

Notary Public in and for the State of Washington, residing at Seattle [22]

EXHIBIT 'B'

CONTRACT OF EMPLOYMENT

This Agreement Made this.....day of ....., 1943, by and between James Henry Packing Co., a corporation, as first party, and ....., as second party; Witnesseth:

Whereas, first party is the lessee of the meat market at number....., Seattle, Washington, and second party desires to enter the service of first party as the manager of said meat market;

Now, Therefore, It is mutually Agreed as follows:

1. First party hereby hires second party, and second party hereby agrees to work for first party, as the manager of the meat market above referred to for the term of one year from the date hereof.

2. That during the term of this agreement second party shall:

(a) Manage, direct, and superintend the business of said meat market to the best of his ability, subject at all times to the direction, instructions, and control of first party.

(b) Keep such books, and accounts, and records as may be prescribed from time to time by first party, and correctly enter therein any

and all moneys received, as well as all merchandise received or sold, from said premises, and, at weekly intervals, duly account to first party for all moneys received by him in the operation of the business of said meat market.

3. That during the term of his employment, second party shall properly manage said meat market, and for his services first party [23] shall pay to second party all remaining receipts and revenues from the operation of said market remaining after deducting all expenses of operation and costs of merchandise and ten per cent (10%) of gross sales.

4. Second party agrees to incur no obligations or liabilities whatever without prior authorization therefor from first party.

Executed in Duplicate the day and year herein first above written.

JAMES HENRY PACKING CO.,
First Party

By.....
President

.....
Second Party

[Endorsed]: Filed Dec. 11, 1944. [24]

[Title of District Court and Cause.]

SUPPLEMENTAL STIPULATION

Supplementing the stipulation herein dated October 11, 1944, it is hereby further Stipulated and Agreed as follows:

1. That eight of said 25 individuals, at all times during the year 1943, owned their said markets and the premises in which the markets were located; and the remaining 17 individuals owned their respective markets, but rented the premises in which the markets were located, and, to the knowledge of defendant, no specific permission was obtained from the owners of such leased premises to execute Exhibit 'A'; nor were said owners of leased premises notified of the execution of Exhibit 'A.'

2. Invoices of meats delivered to said 25 markets subsequent to the execution of Exhibits 'A' and 'B,' by defendant, were rendered in the same manner and form as before the execution of said Exhibits.

3. That during the life of said Exhibits 'A' and 'B,' the receipts by defendant from beef delivered to said markets averaged 57% of all meats delivered to said markets; and, while no records were kept by said markets of the percentage of beef to total sales [25] at retail, it was estimated and agreed by and between said individuals and the defendant that beef sales by said retail markets approximated 30% of total sales except in the cases of Lindquist and Brown, who estimated their beef sales at 50% of said total, and Frank Blunden, who estimated his sales at 40% of said total; and, beginning with

the month of September 1943, defendant's percentage was computed on 70% only of total sales of all of said markets except the markets managed by Lindquist and Brown and Frank Blunden. On these two markets defendant's percentage was computed on 50% and 60%, respectively, of their total sales.

4. That no rent was actually paid by defendant under Exhibit 'A.' The manner of arriving at defendant's percentage of gross sales was as follows: The total amount of weekly gross sales was reported to defendant, together with check for 10% thereof, up to September 1, 1943, and, after that time, said percentage was reduced to 7%, and in the cases of Lindquist and Brown and Frank Blunden the percentage was reduced to 5% and 6%, respectively. The balance, after deducting all expenses, including rent, was retained by the manager.

Dated at Seattle, Washington, this 15 day of November 1944.

GEORGE H. LAYMAN
District Enforcement Attorney
C. E. HUGHES
Litigation Attorney
Attorneys for Plaintiff.
ALMON RAY SMITH
HENRY CLAY AGNEW
Attorneys for Defendant.

[Endorsed]: Filed Dec. 1, 1944. [26]

[Title of District Court and Cause.]

MOTION FOR DISMISSAL

James Henry Packing Company, defendant, moves for an order dismissing the above entitled action on the grounds, as alleged affirmatively in its amended answer, that this action was not instituted nor authorized by the plaintiff, and that the persons who instituted and are prosecuting the action acted, and are acting, without authority in law or in fact.

A statement of reasons in support of the motion and the citation of authorities on which defendant relies is attached hereto.

ALMON RAY SMITH
HENRY CLAY AGNEW
Attorneys for Defendant.

STATEMENT OF REASONS IN SUPPORT OF MOTION TO AMEND ANSWER

The attorneys for the plaintiff admit that no specific authority was given by Chester Bowles, Administrator, to commence this aciton, and, according to a brief heretofore served by said attorneys for plaintiff and filed in opposition to defendant's motion for leave to amend its answer affirmatively alleging such absence of authority, it is apparent that the attorneys rely on certain general provisions in the Emergency Price Control Act of 1942 and certain General Orders which defendant contends do not constitute the authority to bring the suit, and that the act of instituting the

suit was void and cannot be validated by subsequent recognition or ratification.

Authorities in support of defendant's motion are hereto attached in the form of a trial brief.

ALMON RAY SMITH
HENRY CLAY AGNEW
Attorneys for Defendant [28]

[Title of District Court and Cause.]

TRIAL BRIEF RE AUTHORITY TO INSTITUTE SUIT

Upon leave of court first obtained, and over the objection of counsel for plaintiff, defendant amended its answer to add to its affirmative defense a paragraph reading as follows:

> "Defendant alleges that this action was brought under Section 205 (e) of the Emergency Price Control Act of 1942 in the name of Chester Bowles, Administrator of the Office of Price Administration, but not by said Administrator, and said action was instituted without authority from said Administrator, and said Administrator has no right or discretion under the provisions of said Emergency Price Control Act of 1942, or any other law, to delegate his authority to bring such an action, nor did said Administrator attempt to delegate such authority to the persons who instituted said action, and the act of the per-

sons who instituted said action was without authorization in law or in fact."

It is admitted by counsel for plaintiff that Robert C. Findley and A. V. Stoneman, the attorneys who instituted this action, did so without specific authority from the Administrator of the Office of Price Administration to do so.

Defendant contends that authority to bring this suit could not be delegated, and, in fact, was not delegated, and that the void action of the unauthorized persons who brought the suit cannot be validated by subsequent recognition or ratification by the Administrator. [29]

The Emergency Price Control Act of 1942, under which this action was commenced, confines the right to bring such an action to the Price Administrator and to the Price Administrator only. The Act does not permit the delegation of this authority, and in this respect it differs from many recent Congressional enactments, including the Securities Exchange Act of 1933, the Securities Exchange Act of 1934 and the Public Utility Holding Company Act, all of which are cited in the Cudahy Packing Co. case hereafter referred to.

The case chiefly relied on by the defendant is Cudahy Packing Co. v. Holland (63 SCR 651—315 U. S. 357). In that case the Administrator of the Wage and Hour Division attempted to delegate his authority to issue a subpoena duces tecum. In construing the Fair Labor Standards Act, under which the action was brought, Chief Justice Stone,

Done in Open Court January 19th, 1945.

Exceptions by defendant and same allowed.

CHARLES H. LEAVY
District Judge

Presented and Approved by:

GEORGE H. LAYMAN
C. E. HUGHES
Attorneys for Plaintiff

Copy received this 17 day of Jan. 1945.

ALMON RAY SMITH
Attorney for Def.

[Endorsed]: Filed Jan. 19, 1945. [32]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This mater having come on duly and regularly for trial December 12, 1944, before the Hon. Charles H. Leavy, District Judge, plaintiff apearing by his attorneys, George H. Layman and C. E. Hughes, and defendant appearing by its President, O. B. Joseph, and its attorneys, Almon Ray Smith and Henry Clay Agnew, and evidence having been submitted on behalf of plaintiff and defendant, and this court being duly advised in the premises, makes the following:

FINDINGS OF FACT

I.

That the facts stipulated in the Stipulation and Supplemental Stipulation filed herein, are true and correct, and are hereby incorporated herein and made a part hereof by this reference.

II.

That on or about July 1, 1943, defendant submitted to the Chief Attorney for the Seattle District, Office of Price Administration, at Seattle, Washington, a form of "Lease" and "Contract of Employment", substantially the same as Exhibits "A" and "B" attached to said Stipulation, except that said lease was terminable upon thirty days' notice; that said Chief Attorney on said date advised defendant and his attorney that said lease and contract were an evasion of [33] Maximum Price Regulation 169 and particularly criticised said thirty day cancellation provision; that said defendant immediately thereafter redrafted said lease and omitted therefrom said thirty days' terminable provision, and forthwith executed and put into effect said leases and contracts of employment beginning at various dates from July 1st to July 22, 1943.

III.

That on July 30, 1943, said Chief Attorney notified defendant by letter that said modified leases and contracts constituted an evasion of Maximum Price Regulation 169, and again on August 30, 1943, the Chief Enforcement Attorney notified defendant by letter that said leases and contracts were an evasion

of said regulation and must be terminated, but allowed defendant a reasonable time to terminate same.

IV.

That said defendant failed and neglected to take any steps to terminate said leases and contracts until September 24, 1943, at which time it notified said 25 meat markets to "omit or deduct all receipts of beef and veal furnished by us" but continued thereafter to enforce said leases and contracts and to collect from 5% to 7% of the gross sales of said meat markets until on or about November 8, 1943, after it had collected $19,149.64 in excess of the ceiling prices, at which time said leases and contracts were mutually cancelled by the parties thereto as of November 1, 1943.

V.

That defendant neither during the life of said leases and contracts, nor at any time, paid or provided for the payment of any Social Security tax for the alleged [34] managers or other employees of said stores, as provided by law, nor made any inquiry concerning same. That defendant neither during the life of said leases and contracts, nor at any time, filed any applications with the State of Washington for any license to operate said stores or any of them, as required by the laws of the State of Washington, nor did it pay any retail sales tax on any sales made by said stores, nor make or file any returns showing any sales tax or business tax due said State from said stores, as provided by the laws of the State of Washington; that defendant never inquired of

the owners of said stores or of said 25 meat markets concerning any of the terms or conditions of their leases with the owners of said premises; that the amount of monthly rental fixed by defendant as lessee of said stores was an arbitrary sum, no part of which was paid or credited to any of said 25 markets; that defendant never gave to any of said 25 markets any instructions as to the management or as to the books and records kept or to be kept by said stores, and never authorized any of the obligations incurred by said markets; that all invoices from defendant to said 25 markets covering all meats were exactly the same after the execution of said leases and contracts as before; that no change in the operation of said markets was ever given the public either by notices or by signs of any kind; that the operation, management and control of said 25 markets continued in every way without change after the execution of said leases and contracts as before, except that said 25 markets were required to pay defendant a percentage of their gross sales of all meats in addition to the payment of the ceiling or maximum prices fixed by Maximum Price Regulation 169; that no part of said overcharge has been returned to said 25 markets or paid to plaintiff. That said 25 markets were selected by defendant [35] from several hundred markets supplied with meats by defendant at said time as strategic outlets for its meats.

VI.

That said leases and contracts were and are forbidden evasions of Maximum Price Regulation 169,

and were made by defendant for the purpose of securing a higher price for its beef than that permitted by Maximum Price Regulation 169.

VII.

That the gross sales of said 25 stores in 1942 exceeded $500,000.00; that Maximum Price Regulations 336 and 355, effective at all times during 1943, required any operator of four or more retail stores, if their total gross sales exceeded $500,000.00 in 1942, to sell to consumers at prices lower than the ceiling prices actually charged by said 25 markets during the life of said leases and contracts.

VIII.

That from July 1st to September 15, 1943, defendant received from said 25 markets $13,995.14 in excess of Maximum Price Regulation 169, and from September 15 to November 8, 1943, defendant received from said 25 markets $5,154.50 in excess of Maximum Price Regulation 169. That up to and including September 15, 1943, was a reasonable time allowed defendant to cancel said leases and contracts; that failure to cancel said leases and contracts by September 15, 1943, after said letters of July 30 and August 30, 1943, was an unreasonable delay and said collections in excess of said Maximum Price Regulation 169 was done knowingly by said defendant and was the result of its failure to take practicable precautions against the occurrence of said violations. [36]

IX.

That defendant should be required to pay plaintiff on behalf of the United States single the amount of the overcharge from July 1st to September 15, 1943, in the sum of $13,995.14 and 1½ times the overcharge from September 15, 1943, to November 8, 1943, in the sum of $7,731.75, making a total sum of $21,-726.89 together with costs of suit.

X.

That the above cause was instituted and prosecuted by the duly appointed attorneys for plaintiff at Seattle, Washington, under the provisions of Section 201 (a) of the Emergency Price Control Act of 1942 and amendments thereto, General Order No. 3 as amended October 2 and November 26, 1942 (7FR7910 and 9909), Administrative Order No. 4, part 1, Supplement 7, issued by the Administrator of the Office of Price Administration December 29, 1943, authorization issued May 1, 1943, by the Regional Enforcement Attorney for the 8th Region which includes the Seattle District and Second Revised Order No. 3, effective September 7, 1944 (9FR11137). That by reason of said authorizations said local enforcement attorneys were duly authorized to bring this action and to prosecute same without further specific authority from plaintiff.

Done in Open Court this 19th day of January, 1945.

Exceptions allowed.

CHARLES H. LEAVY
District Judge [37]

CONCLUSIONS OF LAW

From the foregoing Findings of Fact this court renders the following conclusions of law:

I.

That the leases and contracts referred to in the above findings were made by defendant for the purpose of securing a higher price for its beef than is permitted by Maximum Price Regulation 169, and were and are a forbidden evasion of said regulation. That defendant's failure to cancel said leases and contracts by September 15, 1943, was an unreasonable delay and said evasion of Maximum Price Regulation 169 was done knowingly by said defendant and was the result of its failure to take practicable precautions against the occurrence of said violations.

II.

That plaintiff is entitled to judgment against defendant above named for single the amount of the overcharges from July 1st to September 15, 1943, in the sum of $13,995.14, and one and one-half times the overcharge from September 15th to November 8, 1943, in the sum of $7,731.75, making the total sum of $21,726.89, together with costs of suit.

III.

That plaintiff's attorneys were duly authorized to bring this action and to prosecute same without further specific authority from plaintiff than that mentioned in the findings herein.

Done in Open Court January 19, 1945.
Exceptions allowed.

CHARLES H. LEAVY
District Judge

Presented and Approved by:
GEORGE H. LAYMAN
C. E. HUGHES
Attorneys for Plaintiff

[Endorsed]: Filed Jan. 19, 1945. [38]

United States District Court Western District of Washington Northern Division

No. 884

CHESTER BOWLES, Administrator, Office of Price Administration on behalf of the UNITED STATES OF AMERICA,

Plaintiff,

vs.

JAMES HENRY PACKING COMPANY, a Corporation,

Defendant.

JUDGMENT

This matter having come on duly and regularly to be heard. December 12, 1944, before the Hon Charles H. Leavy, District Judge, plaintiff appearing by his attorneys, George H. Layman and C. E. Hughes, and defendant appearing by its president, O. B. Joseph, and its attorneys, Almon Ray Smith

and Henry Clay Agnew, and evidence having been submitted on behalf of plaintiff and defendant, and this court having made its Findings of Fact and rendered its Conclusions of Law, and being duly advised in the premises, it is,

Therefore Ordered and Adjudged that plaintiff above named be and is hereby awarded judgment against James Henry Packing Company, a coropration, defendant above named, in the sum of $21,-726.89 and costs.

It Is Further Ordered and Adjudged that plaintiff's attorneys were duly authorized to bring his action and to prosecute same without a review of any of the facts by the Administrator of the Office of Price Administration personally.

Done in Open Court this 19th day of January, 1945.

CHARLES H. LEAVY
District Judge

Presented and Approved by:
GEORGE H. LAYMAN
C. E. HUGHES
Attorneys for Plaintiff

Copy received this 17 day of Jan. 1945.
ALMON RAY SMITH
Attorney for Defendant

[Endorsed]: Filed Jan. 19, 1945. [40]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice is hereby given that Chester Bowles, Administrator, Office of Price Administration, plaintiff above named, hereby apepals to the Circuit Court of Appeals for the Ninth Circuit from that portion of the final judgment entered in this action on January 19, 1945, determining the damages to be recovered by the plaintiff to be in the sum of $21,726.89.

DAVID LONDON
Acting Regional Litigation Attorney
C. E. HUGHES
Enforcement Attorney
Seattle District Office

Copy rec'd April 5, 1945.
ALMON RAY SMITH P.V.
Attorney for Defendant

[Endorsed]: Filed Apr. 6, 1945. [41]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL PORTIONS OF RECORD

Comes Now the defendant above named and, as Cross-appellant in the above entitled action, submits the following as its designation of additional portions of the records on its cross-appeal to the

United States Circuit Court of Appeals for the Ninth Circuit:

Number 13: Order Granting Leave to File a Complaint in the Emergency Court of Appeals filed February 12, 1945.

Number 14: Notice of Cross-appeal of the defendant.

Dated at Seattle, Washington, this 25th day of May 1945.

ALMON RAY SMITH
Attorney for Cross-appellant

Copy rec'd May 28, 1945.
C. E. HUGHES
Atty. for plaintiff.

[Endorsed]: Filed May 28, 1945.

[Title of District Court and Cause.]

ORDER GRANTING LEAVE TO FILE A COMPLAINT IN THE EMERGENCY COURT OF APPEALS

Upon application of the defendant timely made and filed herein under Section 107 (a) (1) of the amendments to the Emergency Price Control Act of 1942, approved June 30, 1944, and, after hearing arguments of counsel for both plaintiff and defendant;

It is hereby Ordered that James Henry Packing Company, the defendant, be and it is hereby

granted leave to file, within thirty days from the date hereof, in the Emergency Court of Appeals, a complaint against the Administrator, setting forth objections to the validity of any provision which the defendant is alleged to have violated, and particularly Maximum Price Regulation No. 169, as amended, and that until such complaint is filed, and during the pendency of any judicial proceeding following the filing of such complaint, proceedings in this action shall be stayed.

It is further Ordered that upon the entry of this order, the defendant deposit in the registry of this court the amount of the judgment rendered against it in this action, together with interest at the legal rate for one year and costs of suit to [46] abide the judgment of the Emergency Court of Appeals or the Supreme Court of the United States if certiorari is granted; and in case the complaint of the defendant filed in the Emergency Court of Appeals is dismissed, or in case an order or judgment is entered therein overruling the objections set forth in the defendant's said complaint, and certiorari is not granted by the Supreme Court, then the deposit in the registry of the court shall be applied to the satisfaction of the judgment rendered herein, with interest and costs. Should any excess remain over the amount required for such purposes, such excess shall be refunded to the defendant; but in case there is a deficiency, the amount thereof shall forthwith be paid to the clerk of this court by the defendant; provided, however, that in case the defendant perfects an appeal from the judgment ren-

dered herein to the United States Circuit Court of Appeals, then such deposit shall constitute the supersedeas bond on appeal; provided further, that if the court shall deem such amount inadequate, the defendant shall forthwith deposit such additional amount as the court may fix.

Done in Open Court this 12th day of February, 1945.

CHARLES H. LEAVY,
Judge

Presented by:

ALMON RAY SMITH
HENRY CLAY AGNEW
Attorneys for Defendant

Approved as to form:

GEORGE H. LAYMAN
C. E. HUGHES
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 12, 1945. [47]

[Title of District Court and Cause.]

NOTICE OF CROSS-APPEAL TO THE CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that James Henry Packing Company, a corporation, defendant above named, hereby cross-appeals to the Circuit Court of Appeals for the Ninth Circuit from the judgment entered in this action on January 19, 1945, and the whole thereof.

Reference is hereby made to the Order Granting Leave to File a Complaint in the Emergency Court of Appeals entered and filed herein February 12, 1945, in which order it is provided that the defendant deposit in the registry of this court the amount of the judgment rendered against it in this action, together with interest at the legal rate for one year, and costs of suit, and that in case the defendant perfects an appeal from the judgment rendered herein to the United States Circuit Court of Appeals, then such deposit shall constitute the supersedeas bond on appeal. In pursuance of said order, the defendant deposited in the registry of this court on February 15, 1945, the sum of $23,-080.50.

This Notice of Cross-appeal is given and filed without prejudice to the defendant's rights under said order of February 12, 1945, which order provides that, during the pendency of the complaint and judicial proceedings in the Emergency Court of Appeals, [48] proceedings in this action shall be stayed in accordance with Section 204 (e) (2) (i) (iii) of the Emergency Price Control Act of 1942 as amended.

ALMON RAY SMITH
HENRY CLAY AGNEW
Attorneys for Defendant.

Copy received April 16, 1945.
C. E. HUGHES
By T. MURPHY
Attorneys for Plaintiff.

[Endorsed]: Filed April 16, 1945. [49]

[Title of District Court and Cause.]

ORDER TRANSMITTING ORIGINAL EXHIBITS

Good cause appearing therefore, it is hereby ordered that the Clerk of this court transmit to the Circuit Court of Appeals as part of the record of Appeal on this cause, all of the original exhibits introduced in evidence, to-wit:

Plaintiff's Exhibits 1, 2 and 3.

Defendant's Exhibits numbers A-1 to 10 inclusive.

Done in open court this 25th day of June, 1945.

CHARLES H. LEAVY
District Judge

Presented by:

DANIEL M. REAUGH
District Enforcement Attorney of Counsel for Plaintiff Appellant.

Approved:

ALMON RAY SMITH
Attorney for Defendant Cross-Appellant

[Endorsed]: Filed June 25, 1945. [50]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered 1 to 50, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Designations of Record filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle and that the same together with the Reporter's Transcript of Testimony, the original of which is sent up as part of this record, constitute the record on appeal from the Judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit, dated January 19, 1945. [51]

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's Fee (Act of February 11, 1925) for making record, certificate or return.

88 folios at 05c ..... $ 4.40

30 folios at 15c	4.50
Appeal fee (Section 5 of Act) ($5.00 each side)	10.00
Certificate of Clerk to Transcript of Record	.50
Certificate of Clerk to Original Exhibits	.50
Total	$19.90

I further certify that the costs of this record has been equally divided between the respective parties to the appeal.

I further certify that one-half of the total amount above, to-wit, $9.95, has been paid to me by the attorneys for the Appellee and Cross-Appellant. The remainder, in the sum of $9.95, has not been paid to me for the reason that the appeal on behalf of the Appellant and Cross-Appellee is being prosecuted on behalf of the Government.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 27th day of June, 1945.

[Seal] MILLARD P. THOMAS,
Clerk.
By TRUMAN EGGER,
Chief Deputy Clerk. [52]

In the District Court of the United States, for the Western District of Washington, Northern Division

No. 884

CHESTER BOWLES, Administrator, Office of Price Administration,

Plaintiff,

vs.

JAMES HENRY PACKING COMPANY,

Defendant.

TRANSCRIPT OF PROCEEDINGS

Be It Remembered that on the 12th day of December, 1944, at the hour of 10:00 o'clock a.m., the above entitled and numbered cause came on for hearing before the Honorable Charles H. Leavy, one of the judges of the above entitled court, sitting in the District Court of the United States for the Western District of Washington, Northern Division, in the City of Seattle, and State of Washington; the Plaintiff appearing by Messrs. C. E. Hughes and Geo. H. Layman, and the defendant appearing by Messrs. Almon Ray Smith and Henry Clay Agnew;

Whereupon the following proceedings were had and done, to-wit: [3*]

The Court: I just received the file after coming this morning, and I have tried to go through it for the purpose of familiarizing myself with the issues, and I have only a very general idea as to what they

* Page numbering appearing at foot of page of original Reporter's Transcript.

are. For that reason I would appreciate a statement by both counsel for the plaintiff and defendant, briefly, as to the facts. I say that because there appear to be at least two stipulations on facts in this record, and so I will hear from whoever desires, on behalf of the plaintiff, to make a statement as to just what the issues are and whether they have changed any from the original prayer for relief.

Mr. Hughes: If the Court please, this is an action by Chester Bowles, Administrator of the Office of Price Administration, on behalf of the United States of America, against James Henry Packing Company, a corporation, of this city, to recover on behalf of the United States, $57,448.92, treble the amount of overcharges in the sale of beef and veal, and wholesale cuts, thereof, by the defendant, to 25 retail markets at or near Seattle from July the 1st, 1943, to November the 8th, 1943, in violation of Maximum Price Regulation 169 as amended.

Now Exhibit "A," attached to the Complaint, if your Honor will kindly turn to that Complaint——

The Court: Is that the original Complaint?

Mr. Hughes: That is the original Complaint. Your Honor will see it sets out in detail the names of the owners and operators of these 25 retail meat markets, and that sets out the dates and the amounts paid by each of these meat markets to the defendant, in excess of the [4] ceiling price, published by Regulation 169, and that excess was $19,149.64. Now that sum trebled is fifty-seven thousand, plus, which we are asking against the defendant in this action.

Your Honor will see the Answer—the amended

Answer of the defendant. It denies it sold any beef to any of these 25 owners, and alleges that during the period—that is, from July the 1st, 1943, to November the 8th, 1943, these 25 operators were employees. That is their defense, briefly, that they were employees of the defendant.

Now Your Honor will see from the stipulation on file here, and the supplemental stipulation on file, entered into between the plaintiff and the defendant, that stipulation admits, briefly, incorporation of the company, it is engaged in the slaughter house and meat packing business in Seattle, and that it has been and is now engaged in the sale, wholesale, of beef, lamb, pork, and wholesale cuts to retail meat dealers.

The stipulation further admits that Maximum Price Regulation 169, which was published pursuant to the Emergency Price Control Act fixing the maximum price of beef and wholesale cuts, was in effect at all times during 1943,—that is, during the period covered by these since July 1, 1943 to November. As a matter of fact, it was in effect long before and has been ever since.

It further admits that some time prior to July, 1943, each of these 25 retail meat markets, owned and operated their retail meat markets at Seattle, and during that time it bought from the defendant, beef and [5] other meats, for resale, at which time, the stipulation admits, prior to July, 1943, there was a great scarcity of beef; that during July, 1943, these same 25 individuals, executed with the defendant, all on the same form and pattern, a lease —a "so-called lease," I will say—what they denomi-

nate a lease, and the form of which is attached to the stipulation set out as Exhibit "A," and another instrument denominated "contract of employment." That is denominated "B" in the stipulation. These instruments were finally cancelled about November 8, 1943, so Your Honor can see they were in effect from practically July the 1st to around November the 8th. I say July the 1st. I mean the first part of July. Some of these contracts, and so-called contracts and leases were signed all the way from about the 1st of July, I think, until about the 20th, but they were all cancelled about November the 8th.

The stipulation further admits that after the execution and during the life of these two instruments, this alleged lease and contract of employment, the defendant delivered to these meat markets a much greater quantity of beef, and other meats, too, than they did before July the 1st, 1943. It also admits that after July the 1st, 1943, and during the life of these contracts, the defendant invoiced its meats to these retail stores exactly as it had done previously, setting out the quantity and the number of pounds and the price, and it also admits that these markets paid to the defendant not only the Maxium price fixed by Maximum Price Regulation 169, but paid in addition thereto, $19,149.64. Now that sum was [6] a percentage of the entire gross income derived from the business of these 25 markets, as provided in the employment contract. This gross income included income also from the sales of poultry, fish, butter, eggs, cheese

and fruit, none of which was sold by the defendant to these retail meat markets.

Now the stipulation further admits that the itemized statement set out in the Complaint, which Your Honor has just looked at——

The Court: Now, what sum did you say was the gross income of these markets?

Mr. Hughes: I do not know the gross income, but——

The Court: You mean nineteen thousand——

Mr. Hughes: It started out with ten percent of the gross income of these meat markets, and I say that included a lot of things that even was not sold to these meat markets by the defendant.

Now the stipulation further admits that the itemized statement attached to the Complaint which Your Honor has just seen, showing the dates and the amounts paid to the defendant, which totals a little over nineteen thousand dollars, is correct; that those amounts were actually paid.

Now the method used, Your Honor, in calculating this percentage, is that each of these markets, after they had paid the maximum price for the beef and meat, added up his total cash sales—not only his total cash sales, but also his sales on credit, and took ten per cent of that sum before any deduction was made, and paid the [7] defendant these weekly payments, which, on November 8th, totalled nineteen thousand—a little over nineteen thousand dollars, I will say; that about some time in September, this percentage was changed from ten per cent to seven percent—about September. As to two mar-

kets, Frank Blunden and Lindquist & Brown, they paid six percent and five percent. The balance, after paying expenses was kept by the meat markets—operators of the meat markets, so that this plan worked out that the defendant got nineteen thousand—over nineteen thousand dollars in excess of the ceiling price.

The Court: That is the wholesale ceiling price?

Mr. Hughes: That is the wholesale ceiling price —the sales to the retail stores.

Now, Your Honor will notice all this is admitted in the stipulation. If I have not stated this correctly, Mr. Smith, I wish you would correct me, because Iwant to get it exactly right.

Now each of these contracts required these meat markets to pay all the expenses. Of course that was done after the ten percent was taken out.

Your Honor will notice that the lease, attached to the stipulation which is marked Exhibit "A," which was the same for all of these 25 meat markets, provided for a stipulated monthly rental to be paid by the defendant to these meat markets, but the stipulation admits that no rent was ever paid by the defendant to any of these meat markets, and so far as the stipulation is concerned, there is no consideration for this lease or the contract of employment, for the payment of $19,149.64 [8] to the defendant, except he was getting a much greater supply of meat during this period. In other words, it was a case of sign the lease and contract, or get little or no beef. So I think it is obvious from the stipulation that this is a device for the sole pur-

pose of evading Maximum Price Regulation 169, in order to get a high price for meats, not provided by the regulation; that the defendant has admittedly received $19,149.64 in excess of the ceiling price, as fixed by Maximum Price Regulation 169.

Now in connection with the stipulation, if I may read Section 1364.406(a) of Maximum Price Regulation 169, 8 Federal Register 4097, effective April 3, 1943—that is some three months before these contracts were made.

"The price limitation set forth in this revised regulation shall not be evaded either by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase, or receipt of, or relating to beef, veal, or processed products, separately or in conjunction with any other commodity, or service, or by way of any commission, service, transportation, wrapping, packaging, or other charge, or discount, premium, or other privileges, or by tying agreement or other trade understanding."

Now that is provided in Price Regulation 169.

Now reading from Section 1364.408, Revised Maximum Price Regulation 169:

"Enforcement. Persons violating any provisions [9] of this Revised Maximum Price Regulation No. 169, are subject to the criminal penalties, civil enforcement actions, proceedings for suspension of licenses, and suits for treble damages, provided for by the Emergency Price Control Act of 1942, as amended."

Now, Your Honor, stated briefly, the stipulations on file here admit that Revised Maximum Price Regulation 169, fixing the ceiling price of beef, was in full force and effect during the life of these instruments. I do not want to call them leases. I do not think they were really leases, nor were they really contracts of employment, and I have so designated them in the stipulation as "so-called lease," or exhibit—I refer to them as Exhibits "A" and "B."

They further admit—the stipulation admits that the defendant received from these 25 meat markets, during the period from July the 1st, to November the 8th, $19,149.64, in excess of the ceiling price, and the defendant in his answer has now pleaded that they were merely its employees, so I believe that the burden of proof is now upon the defendant to show they were its employees.

Mr. Smith: Your Honor may remember this case—about two months ago we were here before Your Honor upon a motion to strike it from the trial calendar because of an action pending in the court of—Emergency Court of Appeals. Your Honor did not strike it from the calendar, but it was continued and came up mechanically before Judge Bowen, and he said although the decision in the Armour case is not down, it is expected any day. [10]

At this time, I am filing a motion to dismiss, Your Honor. Counsel for plaintiff has, and I believe will admit, that there was no specific authority given to institute this suit.

The defendant bases its motion to dismiss upon an allegation in its affirmative answer which was amended over the objection of the plaintiff, and by leave of the Court, to allege that this action was brought under Section 205(e) of the Emergency Price Control Act of 1942, in the name of Chester Bowles, Administrator of the Office of Price Administration on behalf of the United States of America, but not by said administrator and without authority from said administrator, and said administrator has no right or discretion under the provisions of 94-(t) or any other law to delegate his authority to bring such an action, nor did said administrator attempt to delegate such authority to the persons who instituted and are prosecuting said action, acted and are acting without authorization in law or in fact.

We are relying chiefly, Your Honor, upon the case of Cudahy Packing Company vs. Holland, which I would like at this time to present to the Court. This case is reported in 62 Supreme Court, Page 651.

(Whereupon, argument by respective counsel.)

The Court: I might state to you that I have no hesitancy in holding against the contention of the Price Administrator that the matter of a dismissal for lack of authority is not properly raised in this case. I shall hold that it is, and pass upon it upon its merits, rather than [11] whether it should be pleaded affirmatively or not. In passing upon it

on its merits I want to say that I asked the question of you, Mr. Smith, in reference to whether Mr. Bowles or whoever that individual that happened to be Price Administrator at the moment might be, would personally have to pass upon and exercise a discretion in the matter of instituting an action such as the instant case, present. If Congress intended the Act to be so limited, they would have written into it appropriate language, expressing such limitation. It is silent in that regard—if Congress had so intended they would have made of a highly emergent war measure that otherwise has definite limitations as to its continuance and existence written into it and likewise this limitation.

Mr. Smith: It does not follow that because Congress required this authority to come from the Administrator that he would investigate the merits of every case, any more than the chief executive of every corporation would have to know everything he signs, but a telegram saying "Bring this suit" would be compliance. Now there could be such a thing as some of these young attorneys get in the suit——

The Court: Of course, the answer is, these are all civil service employees. They have all taken an oath. They all occupy an official position. Some of them doubtless assume more powers than they have, but if they do those unusual things, it would be but a short time until they would be discharged and the suit unauthorized would be dismissed.

Mr. Smith: My point was, Your Honor, if a [12] countersuit lay it would be against Chester

Bowles, and could not Chester Bowles—could not his defense be "I did not authorize this suit?" Who did authorize the suit?

The Court: I do not know whether there would be any such thing as a counter-suit against Chester Bowles, but assume there were. I do not think I can decide the issue that presents itself upon that assumption.

I am going to have to hold against you, Mr. Smith, and in so doing I am disregarding, perhaps in a large measure, these various regulations, all of which lend color and weight to the contention of the plaintiff that your motion should be denied, and I shall go directly to the Act and the language of it, and I refer to section 201, sub-division (a), which provides for the appointment of an administrator and his compensation, and then it has this specific language that is extremely comprehensive, and it seems to me covers the situation here completely:

> "The Administrator may, subject to the civil service laws, appoint such employees as he deems necessary in order to carry out his functions and duties under this Act."

Now whoever are his appointees, and they are numbered now by the thousands, they have had to qualify under the civil service laws, rules and regulations, and they—I assume all of them—take an oath, because it is quite customary with that type of government employee that they do, that they will carry out the obligations of the office they assume, in addition to their respect for the [13]

Constitution and laws of the United States and obedience to them.

The language that I have just quoted, though, makes it very clear to me that these employees, when once designated and once qualified and placed upon the federal payroll and given the responsibilities that go with the particular position to which they have been named, can then do any of the things that the Administrator can do if he permits them, and we have a mass of regulatory law here that has been cited already, indicating that in cases of this nature he does permit it.

If a mistake were made or if foolish and ill-considered actions were being instituted to such a degree that they harrassed and annoyed the citizen and destroyed his business and his reputation then of course such cases would not—assume the Administrator was so indifferent as to allow that to continue, such cases could not possibly be carried to a successful conclusion in court—in any court of the land, because when the facts were once developed the action would be dismissed. I feel therefore that we, in passing upon the issues raised in the instant case, are not called upon to indulge in the presumption that there will be, or that there have been abuses. I am frank to say that if the facts in this case, if they need go beyond the stipulated facts, indicate abuse in the case, I would not have the slightest hesitancy in dismissing it, but I am passing now, only on the question as to whether this action is one that is properly before the Court —whether the Court has jurisdiction to proceed by

reason of the fact that, as [14] contended by the defendant, it was unauthorized on the part of the attorneys who brought it.

Further emphasizing and perhaps elaborating on the language quoted from Section 201-(a), a reading of that whole section and certain parts of it, particularly, indicates so clearly what Congressional intent must have been. If you will note, subdivision (d):

> "The Administrator may, from time to time, issue such regulations and orders as he may deem necessary or proper in order to carry out the purposes and provisions of this Act."

and I think as suggested in the argument, that these orders—and they are by the hundreds now, are made by civil service employees who have been appointed by the Administrator, and we know, as a matter of practical application, that the Administrator himself as an individual, can not possibly either dictate or direct the orders, nor know the facts upon which they are all based, and doubtless in numerous of such orders some immediate subordinate or assistant administrator signed his name to them.

Going farther to Section 202, and that deals with investigations, records, and reports, subdivision (a) says he is:

> "——authorized to make such studies and investigations to conduct such hearings, and to obtain such information."

Now that of necessity, to be practical in operation

—or to be practical and be able to be put into operation at all, calls for scores of assistants, in a nation as [15] great as this is, and scattered over a territory as widely as this is.

Subdivision (b) of Section 202 again refers to the fact that the Price Administrator is authorized by regulation or order to require any person who is engaged in the business of dealing with any commodity—it covers the whole commercial life of the nation.

Mr. Smith: May I interrupt Your Honor again? Everything Your Honor has said I believe is answered in the Cudahy case. Might I suggest that Your Honor look at that case during the noon recess?

The Court: I shall do so, but I indicated what I thought was a distinction, but I want to look it over and if we go on with Section 202, we find subdivision (c), again, and subdivision (h)—all of these, and I am not going any farther—all of these indicate to me that the Administrator is required to proceed by subordinate appointees, and Congress fully intended that such should be the case. If I should place any other construction upon the Act, it would simply create a situation that would nullify the effective operation of a highly emergent statute that can exist only during the period of the emergency, and by its very terms is limited to such a period.

I shall, before ruling, since you have requested it, look this case over, but I think I will let you proceed on the assumption that I have overruled your

motion and shall overrule it for the purpose or orderly procedure—with that understanding.

Now, what order do you desire to follow in [16] the matter of submitting your proof?

Mr. Agnew: The defendant would like to make an opening statement on the merits of the defendant's position, at this time.

The Court: Very well, then.

Mr. Agnew: The defendant will present evidence—none of it inconsistent with the stipulated facts, but some of it in explanation of them, and in the conditions, and proof of the conditions which brought about the stipulated facts.

The evidence presented by the defendant will show that prior to—just prior to last July 1st, we had the ceiling price established I believe, by this Regulation 169, naming the wholesale prices on wholesale cuts of beef and veal. Now the James Henry Packing Company did not handle veal at any time, and never has, so veal is not involved in this action. I believe the stipulation somewhere so shows.

The Court: Yes, there is some such——

Mr. Agnew: The situation was local, as Mr. Joseph, as the manager of the James Henry Packing Company will show. Since there was no ceiling price fixed upon livestock, that it became at that time, just prior to July, at least locally, and probably all over the United States, impossible to process livestock because there was no room for the cost of processing. After you processed it, why you had

to sell it at a complete loss. As additional proof, that that was the situation.

At the Congressional hearing as to this 169, [17] the official representative of the Price Administrator appeared and testified "yes" that it was true; that because of failure to place a ceiling price upon livestock carcasses that no proper allowance had been made for the cost of processing, making it impossible to carry on except at a loss.

Now we are conscious of the rule before your Honor and in this court, we can not attack 169 because of the unreasonableness of it, although the procedure is left open to us again by reason of a recent amendment, but not at that time. However, the Armour Packing Company raised that attack directly before the proper court, the Emergency Court, and that matter has been argued before that court. I believe you remember the date?

Mr. Smith: About two months ago.

Mr. Agnew: Still under advisement, at any rate. One of those cases you say it will be decided tomorrow, but sometimes it isn't, but it has been under advisement about 60 days now,—but that was the situation that motivated, anyway, and caused the James Henry Packing Company to go into the retail business.

As to the facts of what happened, there will be very little dispute between the parties—I don't believe any, on any real material point.

As to the legal effect that Your Honor should give to what happened, why there is and will be, a violent disagreement.

Now around July 1st, the evidence will show that most of the 25 retail markets that are involved here, were closed. They couldn't get meat, and so they closed [18] up. The remaining ones were about to close.

We will show, too, that the shortage of meats was not any more acute in beef than it was in pork, hams, bacon, and pork cuts of that kind, which were not involved by this regulation, whatsoever. In other words, all 25 of these markets were out of those, too, and it was just as equally difficult to get those, if not more so as to, in some cases, get a supply of beef, to prevent themselves from going out of business.

The evidence will show that here, locally in King County, and in Seattle, many packing companies owned retail establishments. The James Henry did not, except one. They had one large retail store which they operated, paying the manager and the employees salaries to operate it, and had for a number of years.

The Court: Isn't it involved in this case?

Mr. Agnew: It is not involved, or questioned—that operation is not questioned in this proceeding. Other packing companies, however, particularly here in Seattle, had a good many outlets in which they were financially interested, or actually owned and leased outright—leased them, themselves, and operated them.

The evidence, of course shows in this case, Your Honor, that no ultimate consumer—no claim is made that any ultimate consumer was ever charged

higher than the ceiling price for meat they bought. There is no question about that having happened, so any construction of the facts that will be made by Your Honor, should probably be made with that in mind; that the ultimate consumer was in no way victimized. As a matter of fact, he [19] was helped where otherwise he wouldn't. These various individuals in these various markets came to the James Henry Packing Company, non-approached, asking if there was any arrangement possible, whereby the markets would be taken over by the James Henry Packing Company.

Originally a lease was drawn, different from the one that you see attached to the exhibit, and an employment contract, all about the same, and these men were anxious to sign it, so Mr. Joseph, acting for the James Henry Packing Company took those form leases up with their attorney and then the two of them went to the local office of the O.P.A. for approval. Mr. Hartson was the local officer in charge at that time, and there was several conferences with him about it. He expressed in a conference, about July 1st, it was—approximately then, great disapproval of the form of the lease. He said as long as that provision was in there that allowed either side to cancel this lease on this particular market at their will, that he would have to construe that lease not to be a substantial enough lease, as to not constitute an evasion of the spirit of the O.P.A. Act. So then Mr. Smith, representing the James Henry Packing Company, agreed with Mr. Hartson

he would make that change or any other changes that Mr. Hartson would suggest in the leases. No other change being suggested, Mr. Smith redrafted all the leases and brought the final draft up to Mr. Hartson of the O.P.A. who, after reading it over, says, "That is a good lease, now."

Mr. Hughes: About when was that?

Mr. Agnew: Do you remember the date? [20]

Mr. Smith: About the early part of July—I don't know.

Mr. Agnew: Acting then on that representation, that these leases were then executed. With each lease Your Honor will notice is an employment contract. In each of the 25 cases it happens that the party who leased the market to the James Henry Packing Company, also was the same individual who entered into the employment contract to run the local—the retail market. The employment contract speaks for itself and shows its terms, but they are roughly this: Instead of paying a salary to operate the retail market that now belonged to the James Henry Packing Company, an arrangement was made where ten percent of the gross sales on everything, whether it was beef, butter, eggs, poultry, bacon, or whether it involved an O.P.A. regulation or not, ten percent of the gross was given to the James Henry Packing Company, and the manager, under the employment contract, was compensated by taking 90 percent of the gross, and he in turn was required to pay all expenses of operation by the employment contract, including rent.

The point is raised in the opening statement of

counsel that the stipulation shows that the James Henry Packing Company did not pay the rent, which is true, because in each case, as it happens, under the employment contract the manager would then immediately owe it back, because he had contracted to assume and pay that, and would therefore, under his employment contract, have had to return the check immediately he received it. Therefore, the formality of passing the checks between each other was [21] not gone through with, for the reason it would have been an empty thing. However, the evidence will show that there was in one or two cases some discussion of the employment manager quitting and leaving, although that did not happen.

This arrangement only lasted through two or three months. If that had happened, then the rent would have had to be paid, because the employment manager then would not be in a position of paying it to himself. James Henry Packing Company would have had to pay it to the owner.

That arrangement went on without criticism from anybody for at least up till about August 23, I think was the time. There were some conferences with the O.P.A. around July 30th, a letter was sent in which information was requested, but Mr. Joseph was in Canada, and there was some delay in that conference, and then when he got home he was sick in bed, so a new regulation was passed by amendment, No. 26. The regulation was dated August 16, 1943, and it is called Amendment 26 of the Price Control Act. It is an amendment of 169, I believe. Although it was dated August 16th, no word of it

was received here until August 23rd, and it came out in some of the press services, and I haven't got the exact language of that amendment before me, but it is substantially this, that I can give from memory. It said any device or agreement, short of complete ownership of a retail establishment by a wholesaler, will be deemed to be an evasion. Well anyway, as a result of that letter, Mr. Finley wrote on August the 30th, saying "this arrangement thus constitutes [22] an evasion of the ceiling prices fixed in the regulation, and in our view must now be terminated. A reasonable time will be allowed to effectuate termination before we proceed with legal action. We shall expect, however, to be kept advised of your progress in bringing about recisions." That letter was dated August 30th, and which was signed then by Mr. Stoneman, who, I believe, has now left the department.

Then Mr. Smith and Mr. Joseph, representing the packing company, had several conferences in which they stated, "It seems to us, your objections to this carrying on a retail establishment in that this percentage applies to beef sales, which is the only thing involved under 169, and the estimates from all the markets except two were that the beef sales constituted 30 percent." Now they were charging ten, and in order to roughly make up and eliminate beef sales, they eliminated three percent and in correspondence, put that up to the O.P.A. as to whether or not that arrangement modification would satisfy the O.P.A., and there was considerable correspondence about that, ending in a conference on Novem-

ber the 2nd, in which Mr. Stoneman was present, Mr. Joseph and Mr. Smith, at the O.P.A. Office, where it was definitely then stated that since they appeared to be dissatisfied and that this three percent—throwing off the three percent did not seem to satisfy them, that they would immediately rescind and take steps to rescind the leases, and on the same day, letters were sent by the James Henry Packing Company to all these lessors, in which they stated the O.P.A. was dissatisfied with the legality of this [23] arrangement, now especially, since a new regulation had been passed and come into effect, and for that reason requested that they voluntarily rescind. And all of that was done within two or three days thereafter.

Now on the question of the James Henry Packing Company sending an invoice of whatever beef cuts, pork, and other cuts of meat to each of their own retail establishments, that was not billed—they were not billed, but an invoice in the wholesale price listed under 169 was sent for the purpose of information and bookkeeping only. The evidence will show that for years they followed that same practice in their own market that they have owned outright for years, here—that is, they send the wholesale billing and so by using that as an entry, a man can figure out what his ordinary profits should be, as a matter of bookkeeping. I believe that covers the stand on the matter.

The James Henry Packing Company will show they entered into this with good faith and with the intent, really, to make it permanent. Mr. Joseph,

for his own market, or for the James Henry Packing Company's own market, went way out of his way to get some good eastern beef, at great expense.—It was a finer grade of beef than ever handled by the packing company, in order to build up business for his own markets for the future, to build up their business, and the proof will show they generally regarded it as a permanent thing.

Immediately after taking over the market by leasing, forms were sent out for reports of the defendant's managers. Letters of instructions were sent to them, [24] relative to the matter. The insurance company was consulted as to liability insurance. Now that they owned these retail establishments, the evidence will show they took all the liabilities of ownership; that under the contract had there been any loss in operation, they would have had to pay it; that no meat was ever actually sold; that it was only delivered to their own retail outlets, and that at no time—legally speaking, they could have walked in the next day and pulled it out and taken it to any other market, because no title passed. No title was passed until it was sold to the ultimate consumer, who paid the legitimate and honest price.

The utmost good faith was exercised by the packing company throughout, and every move taken was taken up with the O.P.A. office, and the same day the O.P.A. office definitely made up their mind and said "no, because of this regulation you can't go on any more," letters went out rescinding these leases.

The Court: We still have five minutes. Do you want to make any further statement on the proof you are going to offer?

Mr. Hughes: I don't believe so, Your Honor.

The Court: When was this action instituted with reference to——

Mr. Hughes: I think November 27, 1943.

The Court: In November of 1943?

Mr. Hughes: Pardon me?

The Court: That was when Mr. Finley was still the Regional Attorney?

Mr. Hughes: I was mistaken when I said November. [25] It was filed on February the 29th, 1944.

Mr. Smith: There was an indictment returned in November, I believe, Your Honor, which was dismissed.

Mr. Hughes: This civil action was filed February 29th.

The Court: We will take an intermission now until 1:45 this afternoon.

(Recess)

1:45 o'Clock P. M.

The Court: Now you may proceed.

Mr. Hughes: Your Honor please, before we proceed further, I stated what this stipulation was between the parties, so in order to have the record clear, I would like to have it understood that the stipulation—the supplemental stipulation may be

considered as having been read in full, and as part of the record in this cause.

Mr. Agnew: No objection.

The Court: It will be so understood.

Mr. Smith: May I ask Your Honor, do you consider your ruling before recess the ruling on my motion, or will you make that now?

The Court: I read through this case and I distinguish it sufficiently from the instant situation that I shall adhere to the ruling that I made before the noon intermission, as being the ruling of the Court in this case. [26]

Mr. Smith: Then let the record show an exception.

The Court: Yes, and you may have an exception.

Mr. Agnew: Mr. Hughes, do you take the position we have the laboring oar, or are you going to introduce any further evidence?

Mr. Hughes: Yes, I do not think it is necessary to introduce any further evidence.

Mr. Agnew: If Your Honor please, the defendant first desires to read into the record a portion of the proceedings of October 26, 1943, before the Committee of Agriculture of the House of Representatives, relative to proposed ceilings on live cattle. I could introduce the whole of the printed document as an exhibit—I think I probably will, but I will read only the portion from pages four and five, as material.

The Court: Very well.

Mr. Hughes: If the Court please, I don't know what is in counsel's mind, but it does not seem to me any of this is material or pertinent to the issues involved in the case.

The Court: I assumed it is for the purpose of showing what the intent of Congress was in enacting the act, itself.

Mr. Agnew: It is for the purpose of showing acknowledgment of the conditions at the outset, under which we were working and not for the purpose of attacking this regulation, whatever, Your Honor, but for the purpose of—part of our proof of our general situation which motivated this arrangement for retail—— [27]

Mr. Hughes: I don't still believe, Your Honor, it is material to the issues, and it is just simply reading into the record a lot of extraneous matter that I don't think the Court can consider.

The Court: How much material is there?

Mr. Agnew: The material would amount to about three-quarters of one page.

The Court: Objection will be overruled, and exception allowed.

Now before we leave this matter of these stipulations, there appear to be three stipulations, here, and the offer of proof made a short time ago apparently only covered a stipulation and a supplemental stipulation.

Mr. Hughes: That is right.

Mr. Agnew: I think the third stipulation is a stipulation in taking the order of proof, is all.

The Court: If that is what it deals with, why shouldn't it be made a part of the record?

Mr. Hughes: That should be. I overlooked that. That should be.

Mr. Agnew: That should be. I think Your Honor will notice in the stipulation we do not concede as a matter of law that the stipulated facts need explanation, but we are willing to voluntarily take the burden and put in our explanation, because we want to explain them anyway.

The Court: Yes.

Mr. Agnew: This hearing contains the statements—the portion I am reading, of J. F. Brownlee, Deputy Administrator for Price, Office of Price Administration, [28] J. F. Carroll, Director of the Food Price Division, Office of Price Administration, and R. V. Gilbert, Economic Adviser to the Administration office of Price Administration. Reading from page 4:

Mr. Kleberg of the committee asks this question, relating to 169: "Did anyone discuss the probabilities of the decision with the court, connected with the O.P.A., to give you an idea that the regulations as attacked might be construed to be illegal by the court?"

"Mr. Brownlee: Yes, sir.

"Mr. Kleberg: Who was it?

"Mr. Brownlee: The legal department of the Office of Price Administration feels there are very serious legal doubts as to our ability to defend this action without any action on our part.

"Mr. Kleberg: Did the court intimate that?

"Mr. Brownlee: I can't answer that, sir.

"Mr. Kleberg: How would you arrive at any such definite conclusion?

"Mr. Brownlee: I think we have no alternative except to arrive at it through the best legal advice we can get from the attorneys for the agency. May I say, also, that the figures which we have ourselves would indicate that there was a very ssrious doubt as to its legality.

"Mr. Kinzer: Let me ask this question: Are these attorneys who now tell you you haven't a leg to stand on, the same ones who drew the order and the regulations in the first place?

"Mr. Gilbert: That is right. [29]

"Mr. Hope: They have changed their minds since that time?

"Mr. Gilbert: The situation is just as clear as a bell, and it is not in our judgment, or in the judgment of anybody who has studied this problem, open to any real question. The price of livestock on the average, through the 9 months, the first 9 months of this year, was $1.47 above the level that was necessary to cover the total cost of the non-processing slaughterer. Now, under those circumstances it can be demonstrated that as a class these people have been put into the red, and have been put into the red to the extent of 1½ cents per pound on what they slaughter.

"Mr. Kleberg: And under the law they must be left with an equitable amount of profit.

"Mr. Gilbert: That is right. It puts us under an affirmative obligation to provide a generally fair

and equitable margin for distributors. We have known for a long time, Mr. Chairman, that this situation existed."

Now I will call Mr. Joseph.

The Court: What was the date of those hearings? Last summer, was it?

Mr. Agnew: This hearing is dated October 26, 1943, and he refers to the previous 9 months. [30]

O. B. JOSEPH,

produced as a witness on behalf of the Defendant, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Agnew:

Q. Will you state your name, please?

A. O. B. Joseph.

Q. And what is your business, Mr. Joseph?

A. Meat packer.

Q. Do you hold any office with the defendant James Henry Packing Company?

A. I am president of the company.

Q. Do you hold any other position?

A. I am general manager.

Q. General manager and president?

A. Yes, sir.

Q. How long have you held those positions with that company?

A. I have been manager since about 1916. I have been president for about the last ten years.

(Testimony of O. B. Joseph.)

Q. And will you state generally the kind of business the James Henry Packing Company is in?

A. Well, we do slaughtering and curing—slaughtering up hogs and cattle and sheep, and making hams, bacon, lard and sausages.

Q. And where is your principal market for your products—in what locality?

A. The principal one is right around in the Seattle area and nearby. [31]

Q. You sell some in other cities besides Seattle?

A. Yes, we ship over east of the mountains as far as Yakima, and up as far as Blaine, Washington.

Q. About how many employees are employed by the James Henry Packing Company?

A. Well, right around a hundred at the present time.

Q. Now you are familiar with the stipulation that has been filed in this cause? I believe you looked it over before it was filed. A. Yes, sir.

Q. And attached to that stipulation are twenty-five leases and twenty-five contracts of employment. Did you execute those? A. Yes, I did.

Q. In what capacity?

A. As president of the company.

Q. And I will ask you whether or not your acts in that respect was authorized by your Board of Directors? A. Yes, sir, it was.

Q. After you entered into those agreements, what if anything was done relative to giving

(Testimony of O. B. Joseph.)

instructions to the employees under those employment contracts?

A. Well, I wrote them all a letter, instructing them to be very careful of their prices and not to get any over the ceiling prices.

Q. The Bailiff will hand you what has been marked for identification as Exhibit A-1. State whether or not that is a copy of a letter sent to each of the twenty-five employment managers?

Mr. Hughes: By the term "employment managers" [32] you mean the Lessees?

Mr. Agnew: Lessees?

Mr. Smith: Lessors.

Mr. Hughes: Lessors, I should say. Lessors?

A. Yes, sir, this is a copy of the letter.

Mr. Agnew: We offer this letter, Your Honor.

Mr. Hughes: No objection.

The Court: It will be admitted.

(Whereupon copy of letter dated July 23, 1943, to Mr. Val Sonntag was then received in evidence and marked Defendant's Exhibit A-1).

(Testimony of O. B. Joseph.)

DEFENDANT'S EXHIBIT A-1

Same letter sent to all managers upon signing Lease and Agreement.

July 23, 1943

Mr. Val Sonntag
Manager, Market No. 1
2305 Eastlake Ave.
Seattle 2, Wash.

Dear Mr. Sonntag:

In the operation of our markets we intend to comply fully with the Emergency Price Control Act of 1942, and all rules and regulations issued thereunder, and we wish you to be particular to pay no more than current ceiling prices in purchasing meats and charge no more than current ceiling prices in selling.

We also intend to comply fully with Executive Order No. 9250 and rules and regulations issued thereunder by the Economic Stabilization Director with reference to wages and salaries paid employees. Employees must not be given increases or new help hired at increased wages or salaries. When it becomes necessary to consider such matters, we will make appropriate application for the approval of the National War Labor Board.

We know it is unnecessary to call your attention to these matters as we do not anticipate any violations, but because of our recent acquisition of the

(Testimony of O. B. Joseph.)

market, it seemed timely to make some reference to it.

Yours very truly,
JAMES HENRY PACKING CO.
By O. B. JOSEPH
President

OJ:JE

Mr. Agnew: I will read the contents at this time (reading Defendant's Exhibit A-1).

Mr. Hughes: Pardon, what is the date of that letter?

Mr. Agnew: July 13th, 1943.

Q. Did you prior to this time operate a retail market at all, Mr. Joseph?

A. Yes, we have one retail market we have owned for many years.

Q. And where is that located?

A. That is on Western Avenue and Marion Street.

Q. Now, what merchandise did you deliver to your markets—what sort of merchandise?

A. Oh, we delivered a full line, with the exception of veal, hams, bacon, lard, sausages, beef, pork.

Q. Did you send invoices covering that merchandise?

A. Oh, yes, we always made a record of everything.

Q. At what price did you put it?

A. The ceiling prices. [33]

(Testimony of O. B. Joseph.)

Q. Wholesale?

A. Wholesale ceiling prices, yes, sir.

Q. Did you bill any of these twenty-five markets any different from the one you previously had owned? A. No, always the same.

Q. Followed the bookkeeping——

A. The same procedure.

Q. Did you prepare anything by way of forms for reports to be rendered by your retail markets?

A. Yes, sir, I did.

Q. Did you have those printed?

A. I did. I had them printed.

Q. I will ask you over what period were those reports supposed to be turned in, daily, weekly, or monthly?

A. Well, they were turned in usually weekly. It is a daily report of the sales, but turned in weekly.

Q. Do I understand that correctly, that each of these written ones would be a daily report, but they would turn in all of them weekly?

A. Weekly, yes, sir.

Q. I will hand you what has been marked A-2 for identification and ask you if that is one of the printed forms that you had printed for that operation? A. It is, yes, sir.

Mr. Agnew: We offer this in evidence.

The Court: Is there any objection?

Mr. Hughes: No objection.

The Court: It will be admitted in evidence.

(Testimony of O. B. Joseph.)

(Whereupon printed form referred to was received in evidence and marked Defendant's Exhibit A-2). [34]

DEFENDANT'S EXHIBIT A-2

Market Sales
Daily Report
Date.....

Cash .....
Credit .....
Total .....
Market .....
By .....

10M 7-43 AEFCO.

Q. What about the question of the signs on the exterior of the markets, did you make any change in them or——

A. Well I had signs ordered for all of the markets, but they had not been completed up to the time that we started in to cancel these leases.

Q. That is, you stopped the operation before actual delivery of the sign? A. Yes, sir.

Q. But you had had them ordered?

A. I had had them ordered and they were nearly finished.

Q. What kind of signs were those?

A. Well, it was a sign about four feet long and about eigtheen inches wide.

(Testimony of O. B. Joseph.)

Q. What did it say on it as to the ownership?

A. "James Henry Market No." so and so.

Q. And you had each market——

A. Numbered from 1 up.

Q. You had each market numbered?

A. Yes.

Q. Now to get back to the reasons behind your going into the retail business, Mr. Joseph, will you just state briefly to the Court why you wanted to go in the real estate business, or why you did, and how it came about, and what happened?

Mr. Hughes: Retail—you said "real estate".

Mr. Agnew: Retail business.

A. It wasn't through any solicitation on our part that we got into the retail markets, but there was a tremendous shortage of meats of all kinds at that time, and many of the markets here in this city closed up. Quite a [35] number of people came to me and said that as long as some others had markets there, why couldn't we arrange to take over their market, as they wanted them to be kept intact and did not want to have to close them. I thought it over for a while, and then consulted our counsel to see whether it could be done legally, and if so, how it could be done, and from that, our attorney then drew the lease for me and a contract of employment for these men.

Q. Did you, before proceeding with this, take the matter up with any officers of the O.P.A.?

A. Not until after the first lease was drawn up.

(Testimony of O. B. Joseph.)

Then our attention was called to it by the O.P.A. and Mr. Smith and I went up to see them.

Q. Do you remember about the date the first conference at which you were personally present, occurred?

A. Well, I really don't. I really couldn't give you the dates on that, Mr. Agnew. I don't have them.

Q. Well, with reference to the dates of these original leases that were signed, now was it before or after those were signed—the forms that were finally signed up?

A. It was before they were signed up, the last ones.

Q. I will ask you whether your first leases are in the same form that is shown by the stipulated leases and employment contracts now?

A. No, they were different.

Q. Were you present at the time the first form was taken up with any officials of the O.P.A.?

A. Yes, sir, I was. [36]

Q. Who was present at that time?

A. Well, there was Mr. Hartson and Mr. Sholley, and I don't recall, I think there was someone else there, and Mr. Smith and myself.

Q. Well was there any complaint made to you or in your presence by the officials of the O.P.A. as to the form of that lease at that time?

A. It had a paragraph in there that—or a provision that upon 30 days' notice the lease could be cancelled by either party.

(Testimony of O. B. Joseph.)

Q. And what was stated about that?

A. Well, they did not think that that——

Mr. Hughes: Just a minute.

Q. Who made the statement?

A. Mr. Hartson.

Mr. Hughes: Just a moment. I think, Your Honor, we are getting into deep water here, and this witness is attempting to testify from hearsay without at least laying any foundation for such testimony. I therefore object to it at this time.

The Court: I assume he is offering the testimony for the purpose of showing his good faith in this rather unusual transaction.

Mr. Hughes: Well, now, Your Honor please, in the first place the defendant has not pleaded good faith. There is no good faith pleaded in the answer—the affirmative defense, and I am at a loss to know wherein the good faith applies. Does it apply to his good faith as to his employees, or what is the good faith? In other words, it seems to me that those two [37] contentions, one of which he denies that he sold to these twenty-five employees, in on breath he denies he sold it to them as retailers, but he says he sold it—he gave it to them as their employees or turned it over to them as their employees. Now wherein does the good faith come in? I don't quite understand just what the defendant's contention is, as far as good faith.

The Court: I am taking the opening statement as made by counsel for defendant and from that I draw the inference, which seems to me to be the

(Testimony of O. B. Joseph.)

logical one, that had it not been for the O.P.A. regulations and the enactment of the O.P.A. regulations and the emergency that existed, the defendant would not have gone into the meat business as far as he did in these transactions, but it was for the purpose of meeting that situation and continuing the business—the retail business alive and having an outlet for his own product, and that because the modus operandi was being questioned by the representatives of the government, they were taken into consultation, because you have stipulated the facts that these things did occur, there were twenty-five markets and this type of lease, and this type of employment contract was entered into, and that the meat, excepting veal, was disposed of to the public through these markets, and that the substance of your stipulation goes so far as to say that the price that the packer got, the defendant in this case, was actually above the ceiling prices for wholesale.

Mr. Hughes: Yes, that is true, Your Honor, but it seems to me that his defense, and only defense [38] that he set up, is that these people are his employees. Now it seems to me that is the sole question for the Court to decide, are they his employees?

The Court: Well, I feel that I must give as wide an application as the facts will possibly warrant to the principal of that which would be just and equitable under an unusual and emergent situation, and I shall, insofar as the law and the regulations permit me, do that very thing, and I shall overrule your objection and allow you an exception.

(Testimony of O. B. Joseph.)

You may proceed.

Q. I think the question was, Mr. Joseph, as to what Mr. Hartson said relative to this first lease that was there. What criticism did he make of it if any?

Mr. Hughes: I understand Your Honor to overrule my objection, did I?

The Court: Yes.

A. He made objections to the provision of the cancellation there, the 30 day cancellation.

Q. What was said then relative to whether or not —as to your willingness to correct that by anyone, and if so, who said it?

A. Well then the argument was with our counsel and Mr. Smith in regard to a new lease. They talked over some provisions. I did not pay so much attention to that, as I left that matter up to him, but any way, we left and then a new lease was drawn up by counsel.

Q. Can you state the month that this was in?

A. Well, this was in July.

Q. And it was before the date of these new leases? [39] A. Oh, yes.

Mr. Agnew: Can we agree as to what Mr. Hartson's official title was at that time?

Mr. Layman: Chief Attorney.

Mr. Agnew: Chief Attorney for the local office here?

Mr. Layman: Yes.

Q. After that conference, I will ask you whether or not there was a redraft of the leases?

(Testimony of O. B. Joseph.)

A. Yes, there was.

Q. Were you present at the time that redraft was taken to Judge Hartson?

A. No, I was not.

Q. And what you heard about that, then, was from your attorney? A. That is right.

Q. Did you then execute the present leases that are shown by the stipulation?

A. We did. They were all alike.

Q. I will ask you whether or not, in executing those, you followed the advice of Mr. Smith?

A. Oh, always, yes.

Q. Under the employees' agreement, who paid the expenses?

A. He paid the expenses of them.

Q. Would that include rent?

A. It included all expenses.

Q. And what was the compensation under the employees' agreement—what is his compensation and what was the company's share? What did you pay the man for running the market? [40]

A. We were to get ten percent of the gross sales, and he was to have all of the rest of the profit, and to take care of the expenses.

Q. Would that include rent?

A. That would include rent, as well.

Q. Did you take up the matter with your insurance company of covering these places with liability insurance? A. Yes, we did.

Q. At that time, immediately prior to these

(Testimony of O. B. Joseph.)

leases, I will ask you whether or not there was any ceiling price on livestock that you purchased?

A. No, there was not at that time.

Q. At the price you paid, was it possible to process the meat and sell it at one sixty-nine without loss?

Mr. Hughes: Just a moment, I object to that, if the Court please.

Mr. Agnew: It just goes to the reasons for going into the retail business.

The Court: Objection overruled, you may answer.

A. The question, again?

Q. The question was; was it possible at that time to buy livestock on the market and process it except at a loss?

A. No, it was not, no, sir.

Q. When was the next conference with the O.P.A. officials at which you were present?

A. I can't recall the date.

Q. I will ask you if you received any official notice from the Office of Price Administration in which they advised you that they were ruling that your arrangement was [41] improper?

A. Yes, I did receive it. (paper handed to witness) Yes, sir, I received that.

The Court: Do you offer that in evidence, Mr. Agnew?

Mr. Agnew: I now offer it, Your Honor.

The Court: Any objection?

Mr. Huges: No objection.

(Testimony of O. B. Joseph.)

The Court: It will be admitted in evidence.

(Whereupon letter dated 8/30/43 to James Henry Packing Co. from O.P.A. was received in evidence, marked Defendant's Exhibit A-3, and read to the Court by Mr. Agnew.)

DEFENDANT'S EXHIBIT A-3

Office of Price Administration
3377 White-Henry-Stuart Building
Seattle 1, Washington
August 30, 1943

In Reply Refer To: 21,063 AVS:HJ

James Henry Packing Company
2025 Airport Way
Seattle 8, Washington
Attention: Mr. Joseph, President

Gentlemen:

Judge Hartson and Mr. Sholley have referred to this department for action the matter involving your leasing of retail outlets for meat products. The exchange of correspondence, and other material in the file including copies of your form lease and contract of employment, indicates the facts have been quite fully discussed, and no worthwhile purpose will be served by an extended repetition of them here.

Suffice it to say that in our opinion the effect of your lease-employment arrangement—and particularly as exemplified in paragraph 3 of the "Contract of Employment" form, reading,

(Testimony of O. B. Joseph.)

3. "That during the term of his employment, second party shall properly manage said meat market, and for his services first party shall pay to the second party all remaining receipts and revenues from the operation of said market remaining after deducting all expenses of operation and costs of merchandise and ten per cent (10%) of gross sales."

—is for your firm to secure a higher price for its meat than is permitted by Revised Maximum Price Regulation 169.

The arrangement thus constitutes an evasion of the ceilings fixed in the regulation, and in our view must be terminated.

A reasonable time will be allowed to effectuate termination before we proceed with legal action. We shall expect, however, to be kept advised of your progress in bringing about recisions.

Very truly yours,

R. C. FINLEY
Chief Enforcement Attorney

A. V. STONEMAN
Litigation Attorney

Q. I will ask you if you remember that you answered that letter? A. Yes, I did.

Q. I will ask you if that is a true copy of your answer to the letter that is being handed to you now? A. It is, yes, sir.

(Testimony of O. B. Joseph.)

(Paper handed to Mr. Hughes.)

Mr. Smith: Mr. Hughes, would you just as soon put in the original of that letter?

Mr. Hughes: This is all right, this copy of it.

Mr. Agnew: We offer this letter A-4, a copy of the letter sent.

Mr. Hughes: There is no objection.

The Court: It will be admitted in evidence.

(Whereupon, copy of letter dated 9/2/43 to OPA from Henry Packing Co. was received in evidence and marked Defendant's Exhibit A-4.)

DEFENDANT'S EXHIBIT A-4

September 2, 1943

Office of Price Administration
3337 White Henry Stuart Building
Seattle 1

21,063 AVS:JH
Attention Mr. Stoneman

Gentlemen:

Receipt is acknowledged of your letter of August 30, 1943, stating that our leases of retail markets and the contract of employment with the manager constitute an evasion of price ceilings fixed in Regulation 169.

I am referring your letter to our legal counsel, requesting advice and instructions on how to proceed

(Testimony of O. B. Joseph.)

to accomplish a cancellation of our leases and manager contracts.

Very truly yours,

.....

President, James Henry
Packing Co.

Q. I will ask you if you then further corresponded with the office of the O.P.A.?

A. Yes, we did.

Q. Handing you what has been marked as Exhibit A-5 for identification, I will ask you if the first page—what the first page of that exhibit is?

A. This is a letter addressed to Mr. A. V. Stoneman, Litigation Attorney, Office of Price Administration.

Q. Did you send the original of that?

A. Yes, sir, I did.

Q. And attached to that is a letter. To whom was that letter sent?

A. It says a copy of our letter to the managers is enclosed.

Q. Did you send one of those letters to each manager, which you enclosed? A. I did, yes.

Mr. Hughes: No objection.

Mr. Agnew: Offer it in evidence, Your Honor.

The Court: Any objection?

Mr. Hughes: No objection.

The Court: It may be admitted in evidence.

(Testimony of O. B. Joseph.)

(Whereupon, letter dated 9/24/43 to O.P.A. from Henry Packing Co., with attached copy of letter referred to, was then received and marked Deefndant's Exhibit A-5.)

DEFENDANT'S EXHIBIT A-5

September 24, 1943

Mr. A. V. Stoneman,
Litigation Attorney,
Office of Price Administration
3337 White Henry Stuart Bldg.,
Seattle 1, Washington

Dear Sir:

Please refer to your letter of August 30, 1943, with reference to the employment of Managers for this Company's retail markets.

Pending our protest and appeal of the regulation and your interpretation, we are relinquishing all profits from retail sales of beef and veal furnished by us, and are instructing our Managers accordingly.

A copy of our letter to Managers is enclosed.

Very truly yours,
JAMES HENRY PACKING CO.,
By .....
President

OJ/t

(Zone #4)

Dear Sir:

The Office of Price Administration has adopted

(Testimony of O. B. Joseph.)

an amendment to its Revised Maximum Price Regulation 169 reading:

> "Any transaction, device or arrangement whereby a person who sells, transfers or delivers beef or veal to a retail establishment not wholly owned and operated by such person receives for the beef or veal a greater realization than he would be entitled to receive under this regulation for the sale of such beef or veal to a retailer is a violation of this regulation and is prohibited."

Local attorneys for the Office of Price Administration have advised us that, in their opinion, with respect to beef and veal furnished by us, the terms of our employment of you as Manager constitutes an evasion within the meaning of the amendment.

You will, therefore, in reporting receipts for the purpose of determining your commissions, omit or deduct all receipts from sales of beef and veal furnished by us.

Very truly yours,

JAMES HENRY PACKING CO.,

By .....

OJ/t President.

Mr. Agnew: I will read the letter (Exhibit A-5 was then read.)

Q. I will ask you if from that time on there was a reduction made in the percentage?

A. Yes, there was. [43]

(Testimony of O. B. Joseph.)

Q. How was it figured, Mr. Joseph?

A. Well, after consulting a number of the markets as to what they thought was the amount that they would receive from beef that we furnished to our markets, and that in figuring their returns to us we took 70 percent of the 10 percent that the contract called for, thereby eliminating any receipts from beef. There were two of them. One of them that figured—that is beef sales, would run as high as 50 percent, so we had him discount his then to 50 percent of the 10 percent; and another one that figured that, his beef sales would be around about 40 percent, so we had him to eliminate the 40 percent and pay us 60 percent of the 10 percent. We were doing this in order to comply with this regulation.

The Court: You notified the O.P.A. of the arrangement?

A. Yes we did.

Q. Did you receive any written response and acknowledgment of that notice from the O.P.A. (handing witness paper)? I will ask you a different question, if this exhibit A-6 for identification is that written response?

A. Yes, sir, this is the letter we received.

Mr. Agnew: I offer 6, Your Honor.

The Court: It will be admitted in evidence.

(Whereupon, letter dated 10/4/43 to Henry Packing Co. from O.P.A. referred to was received in evidence, marked Defendant's Exhibit A-6, and was read to the Court.)

(Testimony of O. B. Joseph.)

DEFENDANT'S EXHIBIT A-6

Office of Price Administration
3337 White-Henry-Stuart Building
Seattle 1, Washington

October 4, 1943

In reply refer to 21,063 AVS:HJ

James Henry Packing Company
2025 Airport Way
Seattle 8, Washington

Attention: Mr. Joseph, President

Gentlemen:

With reference to your letter of September 24, transmitting to us a copy of a form letter addressed to persons operating retail outlets under your direction, will you be good enough to inform us whether the deductions from the sales of meat products other than beef and veal, mentioned in your form letter, are still being made by these markets.

Very truly yours,
R. C. FINLEY
District Enforcement
Attorney
A. V. STONEMAN,
Litigation Attorney

Q. Did you answer that letter?
A. I did, yes, sir.

(Testimony of O. B. Joseph.)

The Court: Have you the original of it? [44]

Mr. Agnew: I seem to have a copy here, but it is not a carbon. That seems to be a copy but I am not sure that it is a true carbon. We could agree on it in case you have the original.

Mr. Hughes: Let's see. Yes, that is right, it is dated October 11, 1943. You might write in there "1943".

Q. Handing you Exhibit A-7 for identification, I will ask you whether or not that is a true copy of the answer that you sent the O.P.A. office, to their letter? A. Yes, sir.

Q. Now I will ask you, Mr. Joseph, whether or not on——

Mr. Agnew: Oh, pardon me, withdraw that question.

Offer A-7.

Mr. Hughes: No objection. I wish the record would show that was dated October 11, 1943.

The Court: It will be admitted in evidence.

It seems to be October 11th, yes.

(Whereupon, letter dated 10/11/43 to O.P.A. from Henry Packing Co. was received in evidence and marked Defendant's Exhibit A-7.)

(Testimony of O. B. Joseph.)

DEFENDANT'S EXHIBIT A-7

October 11, 1943.

Mr. A. V. Stoneman
Litigation Attorney
Office of Price Administration
3337 White Henry Stuart Building,
Seattle 1

Dear Sir:

Answering your letter of October 4, 1943 (21,063 AVS:HJ), please be advised that we have made no changes in our leases of retail meat markets other than to comply with your interpretation of the amendment to Maximum Price Regulation 169, as expressed in your letter of August 30, 1943.

Very truly yours,
JAMES HENRY PACKING CO.,
By .....
President.

Q. Following that, I will ask you whether or not you had any conference with the O.P.A. officials on November the 2nd as to whether this arrangement of deducting a percentage on beef and veal was satisfactory to them? A. Yes, we did.

Q. And will you state who was present?

Mr. Hughes: What date was that, pardon me?

Mr. Agnew: November 2nd. [45]

Q. If you remember.

A. I just couldn't say. I don't just recall.

(Testimony of O. B. Joseph.)

Q. Was Mr. Smith with you?

A. Yes, he was.

Q. I will ask you whether or not as a result of that conference there, if on the same day you wrote a letter requesting cancellation of all these contracts from all of the markets?

A. Yes, I remember we wrote a letter asking for cancellation of all the markets.

Q. Did you send that letter to each of the 25 markets? A. Yes, sir.

Q. I will ask you whether or not Exhibit A-8 for identification is a true carbon copy of the letter sent to the 25 markets? A. Yes, it is.

Mr. Agnew: We will offer it.

Mr. Hughes: That was sent to the markets?

Mr. Agnew: To each of the markets, yes, sir. I would like to substitute A-8 for identification, and mark a better copy of A-8.

The Court: You may.

Mr. Hughes: That is all right.

The Court: I don't have any objection.

Q. What has now been marked A-8, dated November 2, addressed to Val Sontag, is your testimony the same in regard to that as the last exhibit? A. Yes.

Q. A better written copy? A. Yes, sir.

Mr. Agnew: We offer this in evidence.

The Court: It will be admitted in evidence.

Mr. Hughes: No objection.

(Whereupon, copy of letter dated 11/2/43 to Val Sontag from Henry Packing Co., referred

(Testimony of O. B. Joseph.)

to, was then received in evidence and marked Defendant's Exhibit A-8.)

DEFENDANT'S EXHIBIT A-8

No. 1 November 2, 1943

Mr. Val Sontag,
2305 Eastlake Ave.,
Seattle, Washington.

Dear Sir:

The Office of Price Administration seems determined to view our lease and our employment of you as market manager as a transaction not sanctioned by Government price regulations.

I disagree with the O.P.A. There is nothing in our lease and agreement which violates price ceilings. On the contrary, the arrangement is beneficial to all concerned and provides a method for the distribution of more inspected meats, with no extra cost to your customers.

However, I fully appreciate the necessity of price regulations and the efforts of the OPA to prevent inflation, and I believe you will agree with me that all business should cooperate with the OPA, even though we may disagree with its methods and rulings, and I am respectfully asking you to agree to a mutual cancellation of our lease and contract of employment as of the end of November 1, 1943.

I hope that following the cancellation of our lease, you can resume the operation of the market,

(Testimony of O. B. Joseph.)

and we wish to assure you that you may depend upon our sincere cooperation.

Very truly yours,

.....

President, James Henry
Packing Co.

OJ/t

Q. I notice in this letter, Mr. Joseph, you ask, although it is dated November 2nd, you ask them for cancellation as of November 1st, in the body of the letter. A. Yes, sir.

Q. Was that done with—and then, after November 1st, the arrangement was discontinued as to all markets? A. That is right.

Mr. Agnew: You may cross examine.

Cross Examination

By Mr. Hughes:

Q. Mr. Joseph, at the time these instruments which you denominate "lease and contract" were made, the furniture and fixtures in those retail stores belonged to these 25 different retailers, did it not? A. I think they did, yes, sir.

Q. And was there any allowance made for the furniture and fixtures in those stores, in your lease?

A. No, there was no arrangement.

Q. Now, I think eight of these 25 markets owned their own premises. I don't know whether Mr. Smith has told you that—the attorney, but he states eight of them. Do you know? [47]

(Testimony of O. B. Joseph.)

A. A number of them. I don't know just how many.

Q. Some of them owned their premises and others leased them?

A. That is right.

Q. All the rent, that was due the owner of these premises was paid by the retailer, was it not?

A. They were to be paid by the people that we hired there, yes.

Q. It was paid by these retailers, is that correct? A. That is right.

Q. And no rent was paid by you to any of the owners of these premises, is that correct?

A. Well, we didn't because that would only be just a duplication of work. If I paid it they would have to give it back to me.

Q. But that was paid by the retailer for you, you claim? A. That is right.

Q. But you never paid the retailer any rent under your lease-contract with him, did you?

A. No, we did not.

Q. Well, why wasn't that done in accordance with the lease?

A. Well, it would only be a duplication of work if I paid him the rent. Then under his contract with me he would have to turn around and pay it back to me again, so——

Q. Well, under your contract arrangement it does not read that way, does it? Your lease says that you will pay each one of them the stipulated sum mentioned in the stipulation, does it, what is set out?

(Testimony of O. B. Joseph.)

A. That was in there for our protection. [48]

Q. That was an asset to the lessee, wasn't it, the retailer? A. Asset?

Q. Yes. It was an account receivable for him, wasn't it?

A. No, it would not be an account receivable.

Q. In other words, that was put in there — it didn't mean anything? A. Oh yes, it did.

Q. Well, when did you pay any of these retailers any rental for the premises that you agreed to pay under your lease?

A. I was just trying to explain to you that if we paid it to them they would have to turn around and pay it back to us. If you want to know the reason we put it in there——

Q. Yes, I would like to know the reason why you put it in there, too.

A. All right. That was only for our own protection in case one of these fellows fell down or he left and we would have to hire somebody else, or supposing one of them would run away and we would have to put somebody else in charge of the market we wanted to protect ourselves, to know how much we would be obligated in the rent.

Q. Well, the fact that the——

A. It was just a matter of business.

Q. The fact that the retailer paid his rent due to the owner of the premises had nothing to do with the the rent you owed him under your lease, did it? Those are two separate transactions, weren't they?

(Testimony of O. B. Joseph.)

A. Oh, I don't know what he had to do with the owner of the [49] building.

Q. Well, if he had to pay the owner of the building rent——

A. There might have been a lot of other conditions outside of the meat market.

Q. But the fact remains that you never paid any rent or gave up any consideration for this lease as mentioned in the lease itself?

A. We gave up any consideration?

Q. Yes, what did you do to take care of the monthly payments provided for in the lease, to the retailer?

A. Why, we furnished these markets with a very good supply of meat, and give them a chance to do some business, and a chance to make some money.

Q. Well the fact remains, I say that you never paid them anything under your lease?

A. As I say, we didn't pay any rent, no.

Q. Yes. Now, how did you come to fix the amount at 10 percent? Pardon.

Mr. Hughes: I will withdraw that.

Q. How did you fix the amount of the rent in these leases?

A. Oh, just a legitimate rent for their markets, is all.

Q. It isn't the same that they pay the owners of those who are leasing, is it?

A. It might not have been the same.

(Testimony of O. B. Joseph.)

Q. It was an arbitrary figure you put in the lease. It didn't mean anything? A. Oh, yes, it did.

Q. Well, you didn't figure at all in—it does not figure at all in your accounting.

A. If I were obliged to take that market over and put [50] somebody else in there, I would want to know how much I would be obligated for the rent.

Q. I say, but it didn't enter into your accounting with the retailer in any way?

A. No, it did not enter into the accounting.

Q. Were any of these leases filed? Of these 25 leases you had executed, did you file any of them with the County Auditor?

A. No, I did not.

Q. Would you ever do that if you leased premises? Is it usual for you to do that?

A. I don't know whether it is customary or not.

Q. These retailers who were renting from their owners, did you get permission from the owners of the property to make these leases with the tenants? A. No, I did not.

Q. You did not. Did you give them any notice that you had sub-leased these premises?

A. No, I did not.

Q. Wouldn't you do that ordinarily if you made a lease for a business property, find out something about the ownership, how much rent he was paying?

A. Well, that would depend upon what the conditions were, I suppose.

Q. You did not even enquire whether the rent you

(Testimony of O. B. Joseph.)

fixed was the same that the lessee was paying, you say? A. No, I did not.

Q. That did not bother you at all, then? That did not enter into your calculations at all? [51]

A. No.

Q. That you considered immaterial?

A. That is immaterial, yes, so far as between he and I.

Q. Now referring to this contract that you call a contract of employment. Did you give these retailers any other notice than you have just offered in evidence here? A. Any other notice?

Q. Any other instructions, I mean.

A. No.

Q. Concerning the management?

A. Oh, I talked to them at different times, yes, but this is the only written ones that I give—written notices.

Q. This is the only uniform instructions that you have given all of them?

A. Yes, sir, that is the only uniform——

Q. Have you given them any instructions in addition to this, as to the management I am speaking of now.

A. I don't remember of any particular case, no.

Q. Have you given them any instructions as to the books of account to be kept, and the records?

A. Oh, yes.

Q. That was the written instructions you just introduced in evidence?

(Testimony of O. B. Joseph.)

A. No, but we sent them these blanks. We furnished all of them with these blanks.

Q. That is the daily record blanks?

A. Daily record blanks.

Q. That has been introduced in evidence. Is there anything else you have given them? A. No.

Q. Instructions about books of account, and records? A. No.

Q. Did you ever authorize them to obligate themselves in any way during this four-months' period from July 1943 to November, 1943?

A. Oh, I gave them——

Q. Outside of what has already been introduced?

A. Yes, but I gave them permission to make purchases at other places, too.

Q. You gave them permission—how did you give that permission? A. How? Verbally.

Q. Well, did you see each one of them?

A. Oh, yes, I have talked to all of them.

Q. And told them to buy whatever they thought they should have?

Mr. Smith: I think Your Honor should refer to the contract, Exhibit "B". There is no use trying to modify that and change that. If Your Honor will read that contract you will see how all this will be done. No instructions were necessary. Those were the instructions.

The Court: Objection will be overruled, exception allowed.

Q. Is that correct? A. That is correct.

Q. Have you given them any other instructions about their obligations?

(Testimony of O. B. Joseph.)

A. Not that I remember of.

Q. Did they get permission from you to incur obligations [53] in buying poultry and fish?

A. Yes, they did.

Q. When was that instruction given?

A. Whenever—at the same time I would tell them whatever they needed that we didn't have, to go ahead and buy it.

Q. Just go ahead and buy it? A. Yes, sir.

Q. Just as they had always been doing?

A. Just the same.

Q. And did you have anything to do with the help—the hiring? A. No.

Q. Hiring and firing of the help?

A. No, sir.

Q. Of the salaries? A. No.

Q. And these markets made no reports to you on their obligations, did they? A. No.

Q. So that you don't know whether they paid all the bills or not, do you?

A. I would have known if they hadn't.

Q. They bought it in their own name, didn't they?

A. Bought it in the name of the market, yes.

Q. Yes, and any bills would go to the market, wouldn't they. All bills went to the market?

A. Yes.

Q. How would you know?

A. How would I know? Well, if they are not paid, why I [54] would hear from it.

(Testimony of O. B. Joseph.)

Q. Well, how would you know?

A. How would I know? Well, they would be coming back to me for it.

Q. Who would?

A. Whoever they owed it to.

Q. How would they know you had anything to do with the market?

A. Oh, they all knew.

Q. Who knew it? A. Everybody knew.

Q. You never gave any notice to the public about this, did you?

A. No, but the dealers knew it.

Q. You never notified the public in any way of the change of the proprietorship in these markets, did you? A. No.

Q. When did you order these signs that you refer to?

A. I just don't recall the date. I could get it for you, though, from the Foley Sign Company.

Q. From what sign company?

A. Foley Sign Company.

Q. Had they made these signs?

A. They had them nearly all completed, yes.

Q. Now, Mr. Joseph, was there a shortage of pork on July the First, 1943?

A. There was a shortage of all kinds of meat along at that time.

Q. Are you sure there was a shortage of pork?

A. Yes. [55]

Q. Did these 25 retailers have any notice of any shortage of pork?

(Testimony of O. B. Joseph.)

A. Did they have notice of it?

Q. Yes.

A. Well, they would certainly know if it was short, yes.

Q. Well, didn't they get all the pork they ordered and wanted prior to July the First?

A. I don't think they did, no, sir.

Q. You don't think they did? A. No, sir.

Q. You know they didn't get the beef that they wanted, don't you? A. Yes, sir.

Q. And you know there was a scarcity of beef around July the First, don't you?

A. Well, there was a great scarcity of all meats.

Q. Wasn't the beef primarily the reason why you made these contracts?

A. Not particularly, no.

Q. How is that?

A. Not particularly beef, no.

Q. Have you got the figures on the pork that you sold these 25 retailers during June, 1943, as compared with July, 1943?

A. Why, I could find it.

Q. You could find it? A. Yes.

Q. And would you say it was less in June than in July, or more?

A. Well, I wouldn't say without checking it. [56]

Q. Well, if you say there was a shortage of pork it would necessarily be less, would it?

A. Not necessarily. We can sell them the same amount and still be short.

(Testimony of O. B. Joseph.)

Q. Well, if they were satisfied in July and were not in June that would be evident, wouldn't it, that they were short in June and not in July?

A. I couldn't say whether they would be satisfied or not.

Q. Well, take for instance the month of June, 1943, as compared with June, 1942, do you know whether your pork was greater or less?

A. I couldn't recall from memory.

Q. You don't? A. No, sir.

Q. Could pork be handled at a profit in June of 1943?

A. I don't—I can't remember what the records are on it.

Q. You know about beef?

A. I do know about beef.

Q. What?

A. I do know about the beef, yes.

Q. You don't know whether pork was or not?

A. I can't recall.

The Court: Well, pork is not involved in these calculations.

Mr. Hughes: I am trying to show there was a shortage of pork, that is all.

Q. Now these invoices you furnished each of these 25 markets were invoices on every shipment that was made to them, didn't you?

A. There is an invoice that goes with every shipment, yes, [57] sir.

Q. That was done prior to July and subsequent to July, 1943? A. Yes, sir.

(Testimony of O. B. Joseph.)

Q. And those invoices were made out just alike in July, August and September, and October. They were made out the same as they were previously, weren't they?

A. Just the same. There was no change.

Q. Now, did you have a license from the City of Seattle to operate these retail markets?

A. Well, we have a license from the City of Seattle, a wholesale license.

Q. A wholesale license, but did you have a retail license to operate these 25 meat markets from the City of Seattle?

A. No, personally we did not.

Q. Did you have any license from the State of Washington to operate these retail meat markets?

A. No, they don't require any.

Q. What is that?

A. I don't think they require any.

Q. You don't think they do? A. No.

Q. And you gave no notice to the public of these leases, did you? A. No, I did not.

Q. Did you apply to the State of Washington for a certificate of registration for the State tax—for the occupation tax? A. No, I did not.

Q. You did not? [58] A. No.

Q. For any of these markets?

A. No, sir.

Q. You never paid any tax to the State for the operation of these retail markets? A. No.

Q. Never made any report to the State on the operation of these markets?

(Testimony of O. B. Joseph.)

A. No, I have not.

Q. Why didn't you do that? A. Well——

Q. You know if you own a retail business you have got to report to the State, don't you? You have got to obtain a license to do business—business and occupation tax? You never did any of those things?

A. No, I never have.

Q. Did anybody else do it to your knowledge?

A. I don't know, I am sure.

Q. As president, you would know, wouldn't you?

A. No, there are many things that are done that I don't know.

Q. In other words, Mr. Joseph, there is no change in the operation of this store after July the First, than before July the first, was there, as far as you know?

A. Any more than that they were supplied well with good meats.

Q. Yes, and you received the ceiling prices for all your meats delivered to these markets for the life of these contracts, didn't you?

A. Yes, sir, we did. [59]

Q. You received in addition to that 10 percent of their gross sales, is that correct?

A. Part of the places we got 10 percent, and some——

Q. You got 10 percent of the sale of all the meats? A. Everything that was sold.

Q. In the meat market? A. Yes, sir.

Q. That included poultry and fish?

(Testimony of O. B. Joseph.)

A. Whatever sales were made in the meat market.

Q. You never supplied them with any poultry or fish, did you? A. No.

Q. Well, now, what additional service did you render to the market after July the First that you did not give them before July the First, 1943?

A. Well we furnished these markets with a much better grade of meats than we did before. We shipped in a lot of cattle from the East, from Denver—high grade stuff that we furnished there, trying to build up their business.

Q. That is the only additional service that you gave?

A. Yes, and furnishing them more meats, of course.

Q. More meats. Now, the amount that you received over the ceiling price was $19,149.64, is that correct?

A. No, that is not correct. We did not receive anything over the ceiling price.

Q. Well you received $19,149.64, then, after you received the ceiling price?

A. We received a profit for the operation of the retail markets. [60]

Q. Did you receive $19,149.64 from these 25 markets?

A. I think that is about the amount.

Q. And did you receive the ceiling price of all the meats you sold these markets?

A. Yes, we did, yes, sir.

(Testimony of O. B. Joseph.)

Q. What was the consideration for that $19,-149.64?

A. Well, the taking over and the management of these markets, and furnishing them with good meats and plenty of it.

Q. Plenty of meats, and that was the purpose of this lease and contract? A. Yes, sir.

Q. You told these markets, didn't you, somewheres around the latter part of June that you couldn't afford to sell at the ceiling prices?

A. I don't know that I made any such statements as that to them.

Q. Well, what did you tell them? Just what was the conversation you had?

A. We just didn't sell them but very little, and we sold inferior meats.

Q. Well, who brought up this question of the lease and the contract? Who suggested that?

A. The different market owners.

Q. You did not suggest it?

A. No, they came to me. I did not go to them.

Q. And is that true with Mr. Mulholland and Mr. Blunden, and everyone of them you say suggested it to you? A. They came to me.

Q. They came to you, and you did not go to them? [61] A. No, I did not.

Q. Well, what did you tell these markets you would be willing to do? What, briefly, did you tell them?

A. Well, I told them that I had taken this up with out attorney and this is the suggestion that he

(Testimony of O. B. Joseph.)

had, and that I had made one or two leases on this basis, and they wanted to come in on it. There was many people that wanted us to take their markets over, but I could take only a certain number, and then if you will notice the ones that I did take over were scattered around all through the city, at strategic points, so as to give the public really an opportunity to buy something.

Q. Now I forgot to ask you about this contract of employment that you have with these retailers. Did you pay any social security tax for any of those managers? A. No, I did not.

Q. You never had any social security card or any form at all, as an employee of yours?

A. No.

Q. Can you tell us why you did not have that detail?

A. Well, they weren't working on a salary.

Q. Well——

A. They were working on a commission.

Q. Well does that make any difference?

A. I really don't know.

Q. You never enquired about that?

A. No. Maybe you would know more about that than I do.

Q. Didn't you tell these retailers that you couldn't let them have any more meat unless they made a contract—this contract and lease? [62]

A. Oh, no.

Q. Didn't you tell them you could not supply them with meat? A. No, no.

(Testimony of O. B. Joseph.)

Q. Well, why make this contract?

A. Because we were giving them a very small amount—we were doing as little as we could and giving cheaper meats.

Q. You told them you could supply them with plenty of meat if they signed the contract and lease. What did you tell them? What was the motive?

A. Well, if we took the markets over we would see that it was well supplied, just like any other business venture when you are taking over a business, why, you want to see that it goes.

Q. In other words, you told them in effect that you couldn't supply them with meat unless some other arrangements were made, is that correct?

A. We couldn't supply them with the quantity that they would want.

Q. But you would supply them with the quantity they wanted if they signed the lease and contract, is that right? A. That is right.

Q. Now you say in August or September you changed this from 10 percent to 7 percent, except as to two of them I believe you said. Lindquist and Brown, for instance, you reduced from 10 to 6 percent. Did Mr. Lindquist go to you and tell you that he thought it was very unfair and he should not pay you? A. No. [63]

Q. That much?

A. No, he did not. I went out to see him when we had this notice about the beef.

Q. Uh-huh?

(Testimony of O. B. Joseph.)

A. And asked him what in his judgment was the amount of his sales for beef that was furnished by us, and he thought it was about 50 percent, so I said, "Well, then, you will eliminate the 50 percent and you will pay us 50 percent of the 10 percent."

Q. And Mr. Blunden?

A. Mr. Blunden, he figured about 40 percent, and so I told him "then you will eliminate the 40 percent."

Q. As a matter of fact——

A. "And pay us sixty percent of the ten percent."

Q. As a matter of fact, Mr. Joseph, Mr. Blunden came to you about that percentage?

A. No.

Q. He is the one who complained, isn't he?

A. No, he never did, no sir.

Q. Now this 10 percent was figured on total gross sales, you say? A. Yes, sir.

Q. That included credit as well as cash?

A. Sales, all sales.

Q. All sales, and if they had customers that they trusted, they had to pay you the 10 percent, regardless of whether they collected it or not, is that correct? A. Yes.

The Court: Now let me interrupt here. Was that just for meats or was that for everything they [64] sold?

A. Everything that was sold in the meat market.

(Testimony of O. B. Joseph.)

The Court: But some of these businesses were combination businesses, weren't they?

A. Yes. It had nothing to do with it, only the meat market. Most of them have groceries too, but this had nothing to do with that. This was just for the markets.

The Court: I think we will take the afternoon intermission now.

(Recess)

Q. Mr. Joseph, referring to Defendant's Exhibit A-1,—pardon me, that should be A-2, I mean. That is the daily report of market sales?

A. Yes, sir.

Q. Was that prepared by these meat markets? They made out these daily reports? These were furnished you every day, were they, by the meat market? A. No, usually once a week.

Q. Once a week? A. Yes, sir.

Q. Did they also give you the daily report?

A. No, some of them just made them up on a weekly——

Q. I see, and you did not check? A. No.

Q. Just took their word for it? A. Yes.

Q. And this requires them to account for the cash as well as the credit? A. Yes, sir.

Q. And the name of the market, by so and so, is printed on there. Now referring to Defendant's Exhibit A-3, which was a letter written by Clinton A. Hartson, Chief Attorney by John G. Sholley, District Attorney, dated July 30, 1943, it says:

(Testimony of O. B. Joseph.)

"You will recall that early in July you and Mr. Smith called at our office and conferred with Judge Hartson and me with respect to the validity under the Revised Maximum Price Regulation 169 of certain proposed transactions, whereby you would lease a number of retail meat markets in the City of Seattle. At that time we advised you that the leasing arrangement first prepared by Mr. Smith would be illegal under Revised Maximum Price Regulation 169. Mr. Smith then prepared sample documents consisting of a lease and a contract of employment which were submitted to this office for consideration."

Now, were those, the leases and contracts that were signed?

A. The ones that he submitted later, yes.

Q. Yes, and he says:

"We referred copies of these documents to our San Francisco office for their opinion."

Those were the ones that were signed?

A. Yes, sir.

Q. Now he enclosed the letter and said:

"In view of the expression of policy [66] on the part of our National Office—this office now is of the opinion that the proposed leasing arrangements between James Henry Packing Company and various retail meat markets in the City of Seattle are forbidden evasions of Revised Maximum Price Regulation 169."

What did you do after you received that letter of July 30, advising you that they were an evasion?

(Testimony of O. B. Joseph.)

A. Referred it to our attorney.

Q. Then what was done?

A. Well, he handled it. I will let him testify.

Q. You don't know what happened after that?

A. Well, I don't remember. The correspondence there, you will see what——

Q. Well, that was July 30th, and after you were told it was an evasion, you kept the contracts going until November the 1st?

A. May I see the letter?

Q. Yes. It is Exhibit A-3 (exhibit handed to witness).

A. This don't—this isn't the same as you are talking about.

Q. Oh, isn't it? Pardon me, I thought I had a different copy. This is August the 30th. It is July 30th. I must have the wrong date here. Oh, I have. I marked that date. This one should be three. I wish you would strike that. That was a mistake.

Well, I still hand you A-3. That letter is dated August the 30th, 1943. A. Uh-huh.

Q. And he tells you there that it is forbidden by Price [67] Regulation 169, doesn't he? He says it constitutes an evasion of the ceiling prices fixed in the regulation, "and in our view must be terminated."

A. Constitutes an evasion of the ceiling prices, yes, sir.

Q. What did you do after August the 30th?

A. Well, he says a reasonable time will be al-

(Testimony of O. B. Joseph.)

lowed to effectuate the terminations of these contracts, so I referred it to our attorney.

Q. You referred it to your attorney?

A. Yes, sir.

Q. And what was done to cancel these contracts?

A. Well we asked to have them cancelled.

Q. You cancelled them on or about November the First?

A. Whatever the date of it. Whatever the dates of those letters are.

Q. Well you received this letter on August the 30th,—at least it is dated August 30th. I assume you got it in regular course and then on September 2nd, your Exhibit A-4 says that you are referring it to legal counsel for advice. What was done pursuant to that notice you received from the Office of Price Administration?

A. Well, I just don't recall. I think our attorney answered it.

Q. Well, as a matter of fact the record shows that you did nothing except finally on September the 24th, you notified your retailers to take off three percent of the ten percent, didn't you?

A. Yes, *30* per cent of the 10 percent. Yes, I notified them there, yes.

Q. That was not until—— [68]

A. That was—an arrangement was made to comply with the objections to the beef and veal here, I think.

Q. Well, you received this on August the 30th or thereabouts, and it was a whole month before

(Testimony of O. B. Joseph.)

you did anything. Can you tell the Court why you waited a month to do anything on that?

A. Yes, I was ill, and the doctor ordered me away for a time, and I did not seem to get any better and I came back and I was in bed for two or three weeks.

Q. Well, somebody tends to your business when you go away?

A. Well not on matters of this kind, they hadn't, because I had been handling it.

Q. Had Mr. Smith been handling it for you?

A. Yes, sir, Mr. Smith had been handling it for me.

Q. What did he do, anything, do you know?

A. Well, I don't know.

Q. There was nothing accomplished as far as these contracts were concerned, until September the 24th, is that right? A. I think not.

Q. Now, do you remember receiving that letter from the Office of Price Administration? That copy was sent to your attorney, Mr. Smith. I don't know whether you have the original or not.

A. Yes, I remember this letter.

Q. Do you remember that letter. You received it, did you, from the—— A. Yes, sir.

Q. Office of Price Administration?

A. Yes, sir. [69]

Mr. Hughes: You are familiar with it. Do you have any objection?

Mr. Agnew: No objection.

The Court: It will be admitted in evidence.

(Testimony of O. B. Joseph.)

(Whereupon copy of letter dated 7/30/43 to Henry Packing Co. from OPA, was then received in evidence and marked Plaintiff's Exhibit No. 1.)

Q. Now, referring to that——

Mr. Hughes: Pardon me, what was the number of that?

The Clerk: Plaintiff's 1.

Q. Referring to that exhibit, Plaintiff's 1, dated July the 30th, 1943.

Mr. Hughes: Which, Your Honor, I would like to read into the record:

"James Henry Packing Co.
"2023 Airport Way,
"Seattle, Washington.
"Attention: Mr. Joseph, President.

"Dear Mr. Joseph:

"You will recall that early in July you and Mr. Smith called at our office and conferred with Judge Hartson and me with respect to the validity, under Revised Maximum Price Regulation 169, of certain proposed transactions whereby you would lease a number of retail meat markets in the city of Seattle. At that time we advised you that the leasing arrangement first prepared by Mr. Smith would be illegal under Revised Maximum Price Regulation 169. Mr. Smith then prepared sample documents, consisting of a lease and a contract [70] of employment, which were submitted to this office for con-

(Testimony of O. B. Joseph.)

sideration. We referred copies of these documents to our San Francisco office for their opinion.

"Yesterday we received a teletype from our National Office on this general subject which makes considerably more clear the position of OPA. Our National Office advises us that because of the patent danger of evasion of the wholesale maximum prices established by Revised Maximum Price Regulation 169, any arrangement which falls short of a complete transfer of ownership and operation of a retail outlet to the wholesaler must be deemed to be forbidden as an evasion if, as a consequence of the arrangement, the wholesaler receives a greater return for the meat supplied than the maximum prices described in Revised Maximum Price Regulation 169.

"We are also advised that a clarifying amendment will soon be issued which will specifically incorporate this rule into Section 1364.406 of the Regulation.

"In view of this expression of policy on the part of our National Office, this Office now is of the opinion that the proposed leasing arrangements between James Henry Packing Co. and various retail meat markets in the city of Seattle are forbidden evasions of Revised Maximum Price Regu-

(Testimony of O. B. Joseph.)

lation 169. We shall, of course, be glad to discuss this matter with you further at your convenience.

"Very truly yours,

"CLINTON H. HARTSON,

"Chief Attorney,

"By: JOHN B. SHOLLEY,

"District Price Attorney."

Q. You received that letter in due course, I presume? A. Yes, sir.

Q. And what did you do when you received this letter of July the 30th, concerning these leases and contracts?

A. I just referred it to our counsel.

Q. Did you do anything about it at all?

A. I referred it to Mr. Smith, our attorney.

Q. Did Mr. Smith advise you what to do?

A. I don't know just what time it was, but around that time I think was when I was away, or shortly after that, that I was taken ill and left.

Q. Well, you referred this to Mr. Smith at the time? A. Yes.

Q. And you did not do anything about this letter until two months later, September the 24th, when you notified these meat dealers to take off three percent of the ten percent, is that correct?

A. Well, not quite, no. There was—I think Mr. Smith had several conferences with them and I think there was some other——

(Testimony of O. B. Joseph.)

Q. I am talking about what you know of your own knowledge, I am asking you now.

A. No, I don't know, just without——

Q. Well, the only move you made pursuant to this letter was September the 24th, as far as you know?

A. Passed it on to our attorney, yes.

Q. Who had authority to manage the James Henry Packing Company while you were away?

A. Well, Mr. Murray our superintendent looks after the operation of the plant. [72]

Q. What is he—what is his title?

A. Superintendent of the plant.

Q. Superintendent of the plant, and who is vice-president? A. Mr. Curtman.

Q. Mr. Curtman. Either of those or both of those were familiar with these transactions, weren't they?

A. Well, I wouldn't say they were familiar with them, no.

Q. They are on the board of directors, aren't they? A. Yes, sir.

Q. You say they authorized you to sign these leases? A. Oh, yes, that is all right.

Q. And they knew about it?

A. Oh, yes, they knew about them.

Q. Well, why didn't you cancel these leases as soon as you received this letter on July the 30th that stated that it was an evasion—or do you know why?

A. Well, we figured that regulation regarding

(Testimony of O. B. Joseph.)

the beef and veal, it seemed to be the only difference that there were.

Q. Well, you did not do anything with that until two months later. Why did you wait?

A. And then we made arrangements to reduce the price on it.

Q. The beef and veal? A. Yes, sir.

Q. Well, you did not do that until two months later. Why did you wait two months?

A. I don't know just what time it was.

Q. You kept collecting all the time the full ten percent up until September the 24th, didn't you?

A. I don't remember the dates, but probably that is it, yes. [73]

Q. You didn't do that just to use up time, did you? You did not do that just to gain time, did you?

A. No, we did not do that just to gain time, no, sir.

Q. Did you refund any of these payments made during August and September, to any of these retailers? A. No, sir.

Q. You had not refunded any of the money at all that you received? A. No, sir.

Q. Of the nineteen thousand some hundred dollars? A. No, sir, we have not.

Q. Well, when you decided on September the 24th that it was illegal for you to do that as to the beef, did it occur to you that you should repay them what they had paid you for the beef?

A. Did it? No.

(Testimony of O. B. Joseph.)

Q. It did not occur to you? A. No.

Q. Well, why did you finally cancel this lease and contract November the First?

A. Well, from the position that the O.P.A. has taken, we found that there would be no use to argue with them any further. We did feel, however, that we were perfectly on the right, and I still do feel so, and even in this letter here it does not definitely say that that is the definite opinion. It said there will be a clarifying amendment soon to be issued and that they will be glad to discuss the matter further at their convenience, so this here was just a matter of the opinion of the man who seemed to write it, I take it. [74]

Q. Now, as a matter of fact you did not. The reason you waited was because you knew the O.P.A. was investigating you pretty closely about that time, around the latter part of October or 1st of November, didn't you?

A. I did not know that they were until about that time, no.

Q. About that time? A. No.

Q. And as counsel has already mentioned, you were indicted in November, 1943?

A. That is right.

Q. Yes, and the indictment was dismissed?

A. It was dismissed, yes.

Q. And this suit was brought. This suit was brought before the indictment was dismissed. Now it was not until the indictment was returned in November, 1943, was it?

(Testimony of O. B. Joseph.)

A. I don't recall the dates.

Mr. Hughes: I think that is all.

Redirect Examination

By Mr. Agnew:

Q. Showing you Exhibit—I believe dated November 2, Exhibit A-8, a letter to all your market men, I will ask you to refresh your memory by examining that and then state as of what date the contracts were terminated.

A. They were terminated as of November 1st.

Q. At that time did you know about any indictment? A. No, I did not.

Q. These had been terminated before any indictment? A. Yes, sir.

Q. It was mentioned about whether these places had any [75] licenses or not—whether you got any for them or not. I will ask you whether or not they had licenses?

A. Well, all these markets had licenses.

Q. Did you take up the question of getting them in your own name?

A. Well, I remember we did discuss it, but we just figured we would let them run out—until they expired, and then renew them.

Q. Was the question of social security tax or unemployment tax raised or taken up at all?

A. Well, I recall that Mr. Smith did speak to me about the social security tax, but we just didn't get around to do anything about it.

Mr. Agnew: That is all.

(Testimony of O. B. Joseph.)

Mr. Hughes: Just a moment, Mr. Joseph.

The Court: The Court wants to ask you a few questions.

These 25 stores or meat markets here involved, were they all customers of yours prior to July, 1940?

A. Yes, sir, they were.

The Court: And did you have others in addition to these twenty-five that bought your products?

A. Yes, sir.

The Court: What did you do with the other stores?

A. Well, we gave them a little, as we had been doing before.

The Court: But you gave these more?

A. Yes, sir.

The Court: Of certain grades of meat? [76]

A. Yes, of everything, that is right.

The Court: Did you change your program at all, of billing them for their meat, over what it had been before you entered into this contract-lease arrangement?

A. No, there would be no change in the billing. We bill them just the same as we do our own market down on Western Avenue.

The Court: Now if your business in July had not have found itself in difficulties with these O.P.A. regulations, particularly the one covering—I think you said beef products? A. Yes.

The Court: Would this arrangement have been made any way? Let me ask the question in another manner. Suppose we had not been in the war and

(Testimony of O. B. Joseph.)

had not had the emergency, was there anything in the situation that would have caused you to have gone out and enter into these so-called lease agreements?

A. Well, it was on account of the shortage of meat that precipitated these leases.

The Court: Well, before you experienced these difficulties and what you considered the inequities of the O.P.A. regulations to the packing industry, were you or your board planning on buying any of these markets?

A. No, no, we were not, no, sir.

The Court: And it was for the purpose of bringing, as you contend, yourself within the provisions of the O.P.A. regulations, and yet being able to be able to continue on your slaughtering of beef, that you took these? [77] A. Yes, it was.

The Court: Now you said you selected them in appropriate places throughout the city?

A. Yes, sir.

The Court: And what was your object in doing that?

A. Well, so many housewives would be able to get one kind of meat at one place, and they would have to go to another, and to another, and sometimes they were running around spending a whole afternoon trying to find certain kinds of meat. Well, when we took these markets over, we put a full supply of meat in there, and had them so that they would be a long ways from each other and also

(Testimony of O. B. Joseph.)

around so that the public in all parts of the city would have an opportunity to make purchases.

The Court: How many of these 25 markets had businesses other than that of selling meat?

A. Well, most of them. I don't recall just how many there are there, but——

The Court: Twenty-five listed.

A. I know, but most of them had other businesses besides selling meat.

The Court: Well, did the owners or operators of them prior to July when this contract came into being, continue to carry on thereafter just as they had before they had signed this agreement, with their business as a whole?

A. Oh, yes, they kept on just the same as they did.

The Court: And when you were receiving under [78] this arrangement the 10 percent, and later the 7 or 6 percent, was that on gross meat sales?

A. Yes.

The Court: Did that include all meats that the market sold?

A. It included all meats that the market sold, and anything else that the market handled. If they handled fish it would include that.

The Court: Butter and dairy products?

A. Well, if they handled it, yes.

The Court: But it did not include groceries if they handled groceries? A. No.

The Court: Or confections?

A. No, nothing like that.

(Testimony of O. B. Joseph.)

The Court: Well, could you advise the Court as to how many, you think, of these 25 did handle groceries and confections and things other than meat products and dairy products?

A. Well, let me see——

The Court: Val Sontag is the first one.

A. No, he did not.

The Court: Nothing but meat?

A. He had nothing but meat.

The Court: Mary Klontz?

A. Mary Klontz? She has groceries, too.

The Court: You don't know what relationship their gross receipts were as between groceries and meat?

A. Well her groceries would be much more than meat. I think she has quite a large place. [79]

The Court: Paul Snyder?

A. Paul Snyder, he has a very large grocery store, too.

The Court: And his gross sales would, in the grocery supply, probably would exceed the meat sales? A. Oh, much more, I am sure it would.

The Court: He had other employees besides himself, there?

A. Oh, yes, he had a number of employees.

The Court: Ray Parmenter?

A. Ray Parmenter, he handled just meat.

The Court: Just meat? A. Yes, sir.

The Court: And Becker Brothers?

A. They had both.

(Testimony of O. B. Joseph.)

The Court: Lindquist & Brown?

A. Just meat.

The Court: Blunden?

A. Blunden, he had just meat.

The Court: Mulholland?

A. He had both groceries and meat.

The Court: Carstensen?

A. Both groceries and meat.

The Court: And Anderson?

A. Both groceries and meat.

The Court: And Stockley?

A. Stockley, both groceries and meat.

The Court: Paar?

A. Paar? Both groceries and meat.

The Court: Mangan? [80]

A. Mangan, both groceries and meat, yes, sir.

The Court: Bosanko?

A. Bosanko was just the meat.

The Court: And Thompson?

A. Just the meat.

The Court: Etten?

A. Etten? No, he would have both.

The Court: Wilmot?

A. Wilmot? Just the meat.

The Court: And Marti? A. Both.

The Court: And the Bungalow Grocery & Market? A. The Bungalow, they have both.

The Court: And William Myers.

A. He has both.

The Court: And Warren Meyer?

A. Warren Meyer? He has both.

(Testimony of O. B. Joseph.)

The Court: And Mar?

A. Mar has both groceries and meat.

The Court: And Vodarski & Sparling?

A. No, they have both.

The Court: And Mirante?

A. Mirante? Just the meat.

The Court: Just meat? A. Yes.

The Court: And Hartwig?

A. Hartwig, just the meat.

The Court: Well, if I have counted them correctly and checked correctly, sixteen of the twenty-five handled groceries and meat. [81]

A. Yes.

The Court: Now in fixing the rental on these premises, did you try to make any distinction at all as to whether—make an allowance or a charge for the grocery business? I ask that not to mislead you in any way, but because your rental range was from twenty to thirty-five dollars.

A. It depended on the size of the market and what would be a reasonable rental for it.

The Court: Did you intend to assume all of the various legal liabilities that you would by reason of becoming the lessor—or the lessee, I mean, or the actual operator and owner of these that you do under the State and Federal laws, under wages and hours and overtime? A. Yes, sir.

The Court: Did you do that?

A. Yes, we did.

The Court: You watched to see that they did not work over the 40 hour week?

(Testimony of O. B. Joseph.)

A. Of course I did not—I could not see each one of them, you know.

The Court: Well, any of them?

A. But we assumed that responsibility.

The Court: But did you check up with any of them to see whether they were complying with it?

A. No, I did not ask them personally.

The Court: Was it your intention to become liable for Federal Social Security tax and Old Age Retirement on these people? [82]

A. Yes, sir.

The Court: Did you?

A. We are liable for that.

Mr. Hughes: What is that?

A. I say we are liable for them.

The Court: Did you make returns to the federal agencies? A. No, we have not.

The Court: And then of course you were asked the question on the State tax, and of course you would be liable for the local tax, would you not, state and county and city on property?

A. Well of course that is all collected and reported in with the business, you know, as the expenses of the business, those things, you know.

The Court: Do you know whether you made any effort to comply with the state sales law, when you take over a business to ascertain who the creditors are and liabilities to them?

A. No, I did not, because these were all substantial people that we were doing business with.

(Testimony of O. B. Joseph.)

The Court: Now you had one market that you actually owned outright and there was no question about it, and it is not involved in these twenty-five?

A. No.

The Court: And it made an outlet for so much of your product as the customers' requirements called for? A. Yes.

The Court: Well, is it your contention that [83] you intended to make of all these businesses a business similar to the one that you had?

A. It was, yes. We expected that we could renew these leases at the end of the year and——

The Court: But you had in each one of these so many other situations involved,—the grocery business and the——

A. No, we did not have anything to do with the grocery business.

The Court: I know, but the man renting the grocery store was running a butcher shop and so he was a butcher, but a grocer on one side of the store, and an employee of yours. A. Yes, sir.

The Court: Did you check how much time he put in for you and how much time he put in for himself?

A. No, because that would be his own lookout for that.

The Court: I think that is all.

A. He paid all the expenses of the operation.

Mr. Hughes: Mr. Joseph, I want to ask you another question.

(Testimony of O. B. Joseph.)

Recross Examination

By Mr. Hughes:

Q. Weren't these 25 retail dealers approached by your salesmen concerning this contract and the lease that has been referred to?

A. Well, not that I know of.

Q. Didn't you talk to your salesmen to mention it to any [84] of them?

A. You don't have to talk to them.

Q. Well, I thought maybe you had mentioned it to them, because they visit them quite often, don't they, your salesmen? A. Yes, sir.

Q. As a matter of fact, that is how any of these came to you and talked to you, because your salesmen asked you to talk to them about this contract, is that not true?

A. No. I don't think it is, because some time before we entered into any of these leases, a number of market men came in to see me to see if we couldn't make some arrangements, and——

Q. Well now, if these meat market men, some of the twenty-five are here now, if they were to say that they were approached by your salesmen and told to come to see you, would you say that that was a fact or not?

A. Well, I couldn't say, but they may have told some of them that, that we had made some other leases.

Mr. Hughes: I think that is all.

(Witness excused)

Mr. Smith: If Your Honor please, I would like to take the stand and identify some letters, but I may be able to contribute something to the argument and would not like to do so unless agreeable to counsel.

The Court: Very well.

Mr. Hughes: That is all right. [85]

ALMON RAY SMITH,

called as a witness on behalf of the Defendant, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Agnew:

Q. Will you state your full name, please?

A. Almon Ray Smith.

Q. You are a professional lawyer?

A. Yes, sir.

Q. How long have you been practicing law?

A. Since about 1912.

Q. And have an office here in Seattle?

A. Yes.

Q. Are you attorney for the James Henry Packing Company?

A. Yes, sir, I have been since about 1935, I guess.

Q. When was the first question brought to you relative to the leases and employment agreements concerned in this matter?

(Testimony of Almon Ray Smith.)

A. Either the latter part of June, 1943 or the early part of July, and I think it was the latter part of June Mr. Joseph called me and consulted me about it on the telephone. Then he came to the office and we had a conference there, and he wanted a form of lease and a form of contract prepared, which I did.

Q. Did you thereafter take the matter up, of that form of contract, with any official of the Price Administration?

A. About July 1st, Mr. Joseph was asked to call at the local office of the O.P.A. regarding this lease and [86] contract. He telephoned me and I met him there, and we had a conference with Judge Hartson with Mr. Scholley, with Mr. Eddington and with some other attorney in the department whose name I have forgot.

At that conference Judge Hartson had copies of my first draft of a lease and the contract of employment, each of which were made subject to cancellation upon 30 days notice.

Q. Was objection made to that form?

A. Judge Hartson objected to that feature.

Q. Did you redraft the contract?

A. I redrafted the contract—the lease and the contract, omitting that feature, making it absolute for the term of one year, and not subject to the cancellation.

Q. Did you again take that matter up with Judge Hartson?

A. Yes, sir, I took the new lease——

(Testimony of Almon Ray Smith.)

Mr. Hughes: Just a moment, if the Court please, I think at this time I should object to any testimony which may state what Judge Hartson told Mr. Smith. On the first ground, I believe it is hearsay, and upon the second ground that procedural regulation No. 1, if I may read it to the Court, Section 54, Interpretations.

"An interpretation rendered by an officer or employee of the Office of Price Administration with respect to any provision of the Act or of any regulation, price schedule, order, requirement, or agreement thereunder, will be regarded by the Office of Price Administration as official only if such interpretation was requested and issued in accordance with Section [87] 55 of this regulation," and so forth.

Now I will read Section 55 of this regulation:

"Any person desiring an official interpretation of the Emergency Price Control Act of 1942 or any regulation, price schedule, order, requirement or agreement thereunder shall request it in writing from the nearest district office of the Office of Price Administration. Such request shall set forth in full the factual situation out of which the interpretative question arises and shall, so far as is practicable, state the names and post office addresses of the persons involved."

And there are other parts of this which I will not read now, but I will pass it up to the Court.

"Any official interpretation, whether or general application or otherwise, may be revoked or modi-

(Testimony of Almon Ray Smith.)

fied by publicly announced statement by any official authorized to announce such interpretations of general application or by a statement or notice by the Price Administrator or General Counsel published in the Federal Register. An official interpretation addressed to a particular person may also be revoked or modified at any time by a statement in writing mailed to such person and signed by the General Counsel or any Associate or Assistant General Counsel. An official interpretation addressed to a particular person by a Regional Attorney, a Regional Price Attorney, or a District Price Attorney may also be revoked or modified at any time by a statement in writing mailed to such person and signed by the [88] Regional Attorney or by the attorney who issued it or his successor."

Now it is quite apparent from that that the requests must be in writing and must set out all the facts and the answer or the interpretation must be in writing and should be signed by one of the following officers.

Now, Your Honor, the purpose of that is very apparent now, because if it were otherwise, some one without authority may be binding the government or its agency to something that they hadn't any right to do.

If counsel wants to show estoppel he should plead estoppel. At any rate, this is a matter of evidence that I think goes to the competency——

The Court: Well, it is your contention that the interpretation placed upon the regulations or the

(Testimony of Almon Ray Smith.)

act, if made by the Administrator or laid down by the man lowest in the scale enumerated, would become binding upon the Court, and the Court could not question the interpretation?

Mr. Hughes: That is right, if it is in writing. If he is going to state some things that Judge Hartson said to him, I think he ought to call Judge Hartson here.

The Court: I am inclined to doubt your position that the interpretation of either of the law or the regulations must be accepted by the courts unquestioned—the regulations must be so accepted, because we can not question their constitutionality and the act itself must be so accepted, but if some one in the administrative branch of the government renders [89] an opinion, that opinion surely can not become the law and binding upon the courts. Otherwise, it seems——

Mr. Hughes: I think you are right on that.

Mr. Layman: If the Court please, I believe if I may add a word, under the procedural regulation such an interpretation would be binding upon the O.P.A. and I think that is probably where the line should be drawn.

The Court: I think I will let the witness answer, because there is an element of good faith in here and I am going to ask counsel, probably, to advise me a little further, and I will inform myself a little further in reference to the penalty provisions, and as to assuming that without now deciding that the government's position is sound here,

(Testimony of Almon Ray Smith.)

but without regard to good faith at all, must the Court impose triple penalties?

Mr. Agnew: That is the portion of the statute I was about to read. That is what makes this evidence clearly admissible.

The Court: Isn't there a case—a like case in Washington, D. C. that involves this, decided by the District Court?

Mr. Agnew: We have the new amendment to the statute, directly to the point, that went into effect July 1st of this year.

Mr. Layman: The like decision is an injunction matter.

The Court: But it discusses a great many features of this Price Control Act.

Mr. Agnew: Of course, under the new amendment [90] it provides for triple damages with this proviso:

"Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation."

so I think clearly this evidence would be admissible.

The Court: I think I will allow it.

Mr. Agnew: I have another argument for its admissibility I could argue later.

I think the question was:

(Testimony of Almon Ray Smith.)

Q. Did you take these leases to Judge Hartson, —the new leases?

A. I redrew the form of lease and contract and went back to Judge Hartson's office.

The Court: I wish you would fix the time, there.

A. This was about July 1st, Your Honor. I can not give you the date. It was the early part of July.

Mr. Hughes: That is the first time you went there?

A. That was at our first conference, and I made the trip back to Judge Hartson's office after having prepared a new lease and contract.

Q. Was it the same day?

A. The same day, late that afternoon, and Judge Hartson, I [91] believe, was alone in his office at that time.

Q. What did he say with reference to the new lease and agreement as you then had it drawn?

A. He read the documents and he said "That is a good lease." He made no comment on the contract. He took them both together and said "That is a good lease."

Q. Were you present at the execution of any of them? A. Yes.

Q. Was it done in your office?

A. Some of them, I think.

Q. Were you present at the execution of all of them, do you know?

A. I believe I acted as Notary on the majority of them, at least.

(Testimony of Almon Ray Smith.)

Q. And when did you next hear from the Office of Price Administration, either you, or any letter referred to you, about the matter?

A. I believe the next step in the transaction was the letter from Mr. Sholley of July 30th, a copy of which was sent to me, at that time.

Q. I will ask you if that is the exhibit, if you will read the number of the exhibit?

A. It is Plaintiff's Exhibit 1, yes.

Q. Is that what you are referring to?

A. That is the letter I refer to, and this is the copy that was sent to me by the Office of O.P.A. Mr. Joseph was in Canada at that time. I don't believe he saw the letter—the original of the letter for some weeks afterwards.

Q. Now, I will ask you if you answered that letter? [92] A. I did.

Q. Calling your attention to Defendant's Exhibit A-9, dated July 31, I will ask you if that is the answer to the letter? A. It is.

Mr. Agnew: Well, this letter of July 30, the last sentence in it says:

> "We shall, of course, be glad to discuss this matter with you further at your convenience."

I offer A-9, the answer.

The Court: It will be admitted in evidence.

(Whereupon, letter to Mr. Hartson dated July 31, 1943, from Mr. Smith, was received in evidence, marked Defendant's Exhibit A-9, and read to the Court.)

(Testimony of Almon Ray Smith.)

DEFENDANT'S EXHIBIT A-9

July 31, 1943

Mr. Clinton H. Hartson
Office of Price Administration
3312 White Henry Stuart Building
Seattle 1

Dear Mr. Hartson:

I received a carbon copy of Mr. Sholley's letter to James Henry Packing Co. advising us of the decision of the National Office to treat the acquisition of retail markets by a packing company under leases as an evasion of price ceiling regulations.

Mr. Joseph is on vacation in Canada, and as soon as he returns, we will get in touch with your office for the suggested conference.

Very truly yours,

.....

ars c

Q. That was the conference suggested by this letter? A. Yes.

Q. Now this letter mentioned that he believes that in a short time there will be a regulation passed clarifying the matter. Was that regulation finally passed?

A. Amendment 26, effective August 16, I believe, came out in press reports as far as I knew, about August 23rd, and Mr. Joseph had come home from Canada ill. I did not get to see him and there was no one else in the company I could consult, but

(Testimony of Almon Ray Smith.)

upon reading Amendment 26 I wrote a letter to Judge Hartson, expressing it was my opinion it was not applicable to our case because the markets were wholly owned and operated, and asking for an interpretation of it. That was August 23rd.

Q. Calling your attention to A-10, I will ask you whether or not that is a copy—true copy of the letter you sent [93] asking for that interpretation?

A. It is.

Mr. Hughes: I do not seem to have a copy, but if you say it is the same, that is all right.

A. It is.

Mr. Agnew: We offer A-10.

The Court: It will be admitted in evidence.

(Whereupon letter dated August 23, 1943, from Mr. Smith to Mr. Hartson, was received in evidence and marked Defendant's Exhibit A.-10.)

DEFENDANT'S EXHIBIT A-10

August 23, 1943

Mr. Clinton H. Hartson
Office of Price Administration
3312 White Henry Stuart Building
Seattle

Dear Judge Hartson:

Through a press service, I have just received a copy of the amendment to MPR 169 reading as follows:

"Any transaction, device or arrangement

(Testimony of Almon Ray Smith.)

> whereby a person who sells, transfers, or delivers beef or veal to a retail establishment not wholly owned and operated by such persons receives for the beef or veal a greater realization than he would be entitled to receive under this regulation for the sale of such beef or veal to a retailer is a violation of this regulation and is prohibited."

It seems to me that the retail markets which have been leased to James Henry Packing Co. are, within the purview of the amendment, "wholly owned and operated" by the packing company. The packing company is not receiving "for the beef or veal a greater realization than he would be entitled to receive under this regulation for the sale of such beef or veal to a retailer," but is operating the meat market in its entirety, and, beef and veal constitute only a part of the merchandise sold.

The lease is absolute, and for its duration the packing company has all of the responsibilities and risks of ownership, and, of necessity, the benefits, if any, resulting from such ownership.

In negotiating these leases, the packing company has provided a means whereby wholesome, inspected meats can be legitimately distributed to the public, and, at the same time, enables these retail markets and the packing company to survive wrong and oppressive conditions resulting from the failure of the Office of Price Administration to include livestock in its price ceilings.

(Testimony of Almon Ray Smith.)

I most earnestly submit that the lease transaction is not an evasion, and it is incredible that the Office of Price Administration should obstruct the efforts of citizens to lawfully meet and correct an unnecessary, onerous condition for which the Office of Price Administration is largely responsible.

The Henry Company has concluded approximately twenty-five leases, all of which are for a term of one year and not subject to cancellation. If the Price Administrator should take the position that the leases are an evasion, then we must, of course, request our lessors to agree to a mutual concellation. All of these markets had well established businesses, but many will no doubt suspend if the leases must be cancelled.

In requesting an interpretation of the amendment, may I again point out that the leases are in no sense devices, but absolute and legal lease transactions.

Very truly yours,

.....

ars c

Q. Now I will call your attention to the letter from Mr. Stoneman the Enforcement Attorney, dated August the 30th, in which he ends by saying:

> "A reasonable time will be allowed to effectuate termination before we proceed with legal action. We shall expect, however, to be kept advised of your progress in bringing about recisions."

(Testimony of Almon Ray Smith.)

Did you immediately after receipt of the letter take any steps to rescind or did you try to make some other arrangements?

A. Upon receipt of Mr. Stoneman's letter on August 1st, I had a conference with Mr. Joseph and we concluded that inasmuch as the objection was based on 169, relating entirely to beef, that we could eliminate beef—eliminate any benefit from beef, and there would be no further objection from the O.P.A., and we proceeded to do so, and shortly after that I wrote a letter to Mr. Stoneman sending him a copy of our letter to all managers requesting them to deduct all beef sales before computing the [94] percentage of the packing company. It developed that none of the retail markets kept segregated accounts of beef. Mr. Joseph had conferences with each and every one, and with the exception of two, they agreed that 30 percent would be a proper percentage. One thought 40 and one 50. Thereafter, that percentage was eliminated from the gross before computing the packing company's percentage.

Q. Did you take the matter up with the O.P.A. office as to whether or not such reduction would satisfy the requirement? A. We did.

Q. And when did you get a definite answer that it would not?

A. Well, it was the date of Mr. Stoneman's last letter there. I have forgotten the date. Not until then did we have definite knowledge that they considered them to be——

(Testimony of Almon Ray Smith.)

Q. Calling your attention to a letter that was sent out to all of the dealers on November 2, asking cancellation of all the contracts as of November 1, I will ask you if on November 2nd you had any conference with the officials of the O.P.A.?

A. Yes, I did.

Q. And as a result of that conference I will ask you whether or not that was the time you got the definite answer that deduction on beef sales would not satisfy them? A. That is true.

Q. I will ask you if at all times, whether or not you [95] advised the James Henry Packing Company that these leases and agreements were legal and not violative of the O.P.A.?

A. Yes, sir, I did.

Q. That was your opinion then?

A. That was my opinion.

Q. And now? A. And is now.

Mr. Agnew: You may cross examine.

Cross Examination

By Mr. Hughes:

Q. You say Mr. Joseph came to your office around somewheres—before July the first, and asked you—and told you he wanted a lease and contract drawn for these meat markets?

A. Yes.

Q. And that you drew this lease and contract and on or about July the First you took the first draft up to Mr. Sholley and Mr. Hartson?

A. Yes.

(Testimony of Almon Ray Smith.)

Q. Did you take it up to those two?

A. Yes, sir.

Q. And he told you it was unsatisfactory?

A. Yes.

Q. And that same day you say you redrafted the lease. The contract remained the same, did it?

A. Except that the original contract was also subject to cancellation upon 30 days' notice by either party. That feature Judge Hartson objected to and I deleted it. [96]

Q. Those were the only two features he objected to, you say? A. I think so.

Q. Well, do you know? Can you state positively?

A. Well I will state positively, because he made no objection to the redraft, and those were the only changes.

Q. You brought that redraft back and you say Judge Hartson told you that the lease was all right?

A. Yes.

Q. What did he say? What were his words?

A. His exact words, which you will find in one of these exhibits was "Ray," he said, "that is a good lease".

Q. What did he say about the contract?

A. I don't recall that he said anything about the contract. He just had the two together.

Q. He said that was a good lease?

A. Yes.

Q. He said "That is a good lease" as a matter of fact—— A. Yes.

(Testimony of Almon Ray Smith.)

Q. "But it is not a good lease under these circumstances." A. It is a splendid——

Q. Did he say "under these circumstances"?

A. No.

Q. All he said was "a good lease"?

A. Yes.

Q. Now you say on July the 31st, I believe, you wrote the O.P.A. and told them that in answer to theirs of the same date, I guess, that Mr. Joseph was on vacation. What did you do to rectify the situation at that time?

A. I did nothing, as I have just testified, by reason of [97] having no opportunity to confer with Mr. Joseph who was home ill, after returning from Canada, until Amendment 26 was issued, and then I wrote Judge Hartson again, expressing my opinion that it was not aplicable to our lease and asking for his opinion, or an interpretation.

Q. You are secretary of the James Henry Packing Company, aren't you?

A. I am but not an executive. I am not actively associated.

Q. Well, the superintendent attends to business while he is gone? A. Nothing of this kind.

Q. And you let this matter ride for a period of two months before anything was done?

A. Mr. Hughes, there was nobody at the James Henry Packing Company except Mr. O. B. Joseph, with whom I could confer about this matter. In fact, no one there knew very much about it, if anything.

(Testimony of Almon Ray Smith.)

Q. After you were notified on July 31st definitely that the lease was objectionable——

A. I was never——

Q. You still continued to collect money until September 24th?

A. We did not,—we took no steps then to cancel the lease because I still believed that the leases were not evasions, and we had no definite interpretation from the O.P.A. That was a matter of just a couple of weeks, and up to that time there had been no amendment—there had been no regulation.

Q. Now in your letter of August 23rd, referring to [98] Defendant's Exhibit A-10, you say:

> "It seems to me that the retail markets which have been leased to James Henry Packing Company are, within the purview of the amendment, wholly owned and operated."

Now you don't claim that they were either wholly owned or wholly operated, do you?

A. I don't claim so. I am sure they were.

Q. They were, notwithstanding the fact that he, as you heard the testimony this morninig, testified that none of these leases were filed——

A. That was their responsibility, but I do not file one year leases, do you?

Q. Do you know there is no—Mr. Smith, that there was no social security arrangements made to take care of the social security requirements?

A. Matters were going pretty fast and there was a number of things to do in connection with negotiating leases of twenty-five business establish-

(Testimony of Almon Ray Smith.)

ments. It escaped my attention. That was my oversight, but along in August, I either by telephone or orally, informed Mr. Joseph that we should make social security returns, because even though they were working on a percentage basis, they were employees and at that time we had further conferences about illegality and there was nothing certain about our continuing, and I did not follow it up.

Q. As a matter of fact you made no provision for the social security during the whole time these contracts ran? [99]

A. No, we made no reports.

Q. You made no application to the State?

A. No, that is right.

Q. For permission to do business, did you?

A. No.

Q. And you paid no retail sales tax as an owner of the business?

A. Well, the markets pay that, of course.

Q. But you know the owner has to make application and be responsible for that, don't you, to the State?

A. The State is only interested in getting the money, and it was being paid by the market. Their manager represented James Henry Packing Company in all those matters.

Q. You know you have to make application to the State to do business.

A. Yes, you should get——

(Testimony of Almon Ray Smith.)

Q. And you know Mr. Joseph or the defendant has never made such application?

A. That is true. This only lasted about——

Q. You also know we have a similar ordinance requiring the same thing to be done in the City of Seattle, is that correct?

A. The markets had licenses, you know.

Q. I am talking about the occupational tax—the business tax, now.

A. I am not sure that was in effect then. I don't think it was,—I don't think it was.

Q. Well, it was in effect in July, 1943, the city?

A. The city occupational tax? [100]

Q. The city occupational tax went into effect July 1, 1943?

A. If it was and it was necessary for us to get that dollar certificate, that was another oversight of mine.

Q. When you made these leases you made no inquiry from the owner, whether the tenant had any right to lease to the defendant, did you? Did you make any inquiry about that? A. No.

Q. Well, wouldn't you do that, ordinarily, when you are going into a lease?

A. It didn't occur to me that any owner of premises would object to having a more responsible tenant, on a one year's lease.

Q. Yes, but Mr. Smith, you did not know that the same provisions applying to your lease applied to the lease between the retailer and the owner, did you?

(Testimony of Almon Ray Smith.)

A. If the owner had any objections we would have heard from him and we would have had to deal with him.

Q. You never notified the public you took these stores over? A. How do you notify?

Q. By press, and otherwise, and signs.

A. We were about to.

Q. Well you did not notify the public?

A. It never occurred to me there was any obligation to notify the public.

Q. Well, nobody knew they were dealing with the defendant in this case when they went there to buy meat, did they?

A. Well, I don't suppose Mr. Joseph made a point to be there and tell them. Perhaps the managers did, and as I [101] say, we were getting signs made to put up there.

Q. On the face of these oversights you still claim it was wholly operated?

A. With that solemnly executed and acknowledged lease I can't see how the James Henry Packing Company could be anything but the sole and exclusive owner of that business. Now if not, what was their relation and what was the relation of the manager.

Q. I am asking you this question, too: There was no rent ever paid by the defendant to any of these retail markets in accordance with the lease?

A. Well, that has been gone over many times, Mr. Hughes, but there was no transfers of checks.

(Testimony of Almon Ray Smith.)

Q. No transfers of money or anything else of value, was there?

A. No, it would have been an idle ceremony to do it under the language of the contract.

Mr. Hughes: We disagree on that. I just wanted the record to show it.

Q. You say in the latter part of your letter:

> "If the Administrator should take the position that the leases are an evasion, then we must, of course, request our lessors to agree to a mutual cancellation."

but nothing was done, notwithstanding this?

A. I think it was very manifest from that date we at that time were deferring to the opinion of the O.P.A. and if it developed that the thing was going to continue to be objectionable to O.P.A. we would ask for a mutual recision. We entered into 25 leases, and it is something [102] that couldn't be dismissed lightly. These people were all satisfied with their leases, were doing better, and did not want to cancel.

Q. Now, Mr. Smith, you stated, I think—if I am wrong tell me—you stated on November 2nd there was a conference you had with the O.P.A. which was the first time you knew that these deductions were unsatisfactory.

A. I did not say unsatisfactory. I believe there had been a letter from Mr. Stoneman before that, had there not?

Q. Yes. A. Which I answered.

(Testimony of Almon Ray Smith.)

Q. Yes, you knew some time before that that the O.P.A. did not approve. You knew as early as July 30th?

A. I was never sure what they did approve or did not approve. We couldn't find out. We were both groping in the dark for light on the thing.

Q. Now who did you say said there would be no objection if the beef were eliminated?

A. I did not say anything about who said that. We assumed that nobody would longer object if it were eliminated.

Mr. Hughes: I think that is all.

Mr. Agnew: That is all.

The Court: It is now time for adjournment. How many more witnesses do you have, Mr. Smith and Mr. Agnew?

Mr. Agnew: That is our case.

The Court: How long will it take you to present your case?

Mr. Hughes: Well I thought I would put Mr.— I would like to put Judge Hartson on for about two [103] minutes, and I think probably we can close it.

(Witness excused.)

The Court: Very well. The Court has got to drive back to Tacoma.

Mr. Hughes: I do not want to keep Your Honor.

The Court: You may call Judge Hartson.

CLINTON H. HARTSON,

called as a witness on behalf of the Plaintiff, after being first duly sworn was examined and testified as follows:

Direct Examination

By Mr. Hughes:

Q. Judge Hartson, were you Chief Attorney for the O.P.A. during 1943, in say June until November, 1943?

A. Till about September 17, 1943.

Q. From prior—sometime prior to that, I suppose you started?

A. About a year and a half.

Q. Judge Hartson, you heard—I don't know whether you heard Mr. Smith's testimony or not as to what——

A. A portion of it. He was on the stand when I came into the courtroom.

Q. Do you remember Mr. Smith, and Mr. Joseph, being in your office about—along about the first of July? Just to refresh your memory, here is a letter dated July the 30th. You might glance at it just to refresh [104] your memory about the dates.

A. Well, that is approximately true.

Q. And do you remember that Mr. Smith gave you a copy of his lease and contract of employment which he proposed to have executed, or had already executed?

A. Yes, I remember that. I remember that.

Q. And did you approve or disapprove of the first draft that was given you?

(Testimony of Clinton H. Hartson.)

A. We disapproved it.

Q. He said—Mr. Smith said he went back to his office and redrafted the lease and contract by changing the portion which provided for cancellation upon 30 days' notice, and he stated that after making that change you approved of the lease and contract. Would you state the facts?

Mr. Hughes: I have not had an opportunity to talk to Judge Hartson about this.

A. Yes, and I have not refreshed my recollection except by the paper you handed me just now. My recollection is different. About that time a number of the local packing companies were endeavoring to get some increases in income or profits by entering into leases with local butcher shops, and the Acme Packing Company was one, and there was a number of others. I remember very distinctly that the general problem was, as we saw it at our office in appraising those lessons or contracts, where did its economic burden lay,—or lie? Mr. Sholley was the Chief Price Attorney. Upon him, primarily, rested the technical answers to the question as to whether a particular lease was within the regulation. [105]

Q. That is Mr. Sholley, sitting here (indicating)?

A. That is Mr. John B. Sholley. At none of these conversations that I recall, was he absent. He may have been but if he was absent it happened because he didn't happen to be in the office door, and the conversations in most of these packing house

(Testimony of Clinton H. Hartson.)

matters—these lease matters were held in my office, because it was larger. Mr. Sholley's office at that time was quite small—couldn't accommodate many people.

The lease that was first presented by Mr. Smith, Mr. Joseph may or may not have been with him. I don't recall clearly. It was the most outstanding of clear violations—that is, in terms of not being adequate to be within our regulation, as we saw it. Mr. Smith was quite positive that it was all right, but he took it back and shortly—it may have been the next day or it may have been that day, he brought back something else, and my recollection—it is not too clear, was that it was not much better than the first one, but at that time we were going through in our office, a state of some uncertainty as to what the policy of the O.P.A. national office would be in those lease matters. The next office up, in the O.P.A. organization, was the Regional Office at San Francisco. In my conversations with Mr. Smith and Mr. Joseph and the other packing companies—and as I say Mr. Sholley was almost constantly present in those matters—we impressed upon them that the answer must come from the Regional Office, and about that time there was an abrupt decision by the National Office through the Regional Office that all of [106] these leases were to be abrogated—that is, no leases were to be approved by O.P.A. I may have said to Mr. Smith "That is a good lease", or something to that effect. If I did, he knew as well as I knew, that I was not

(Testimony of Clinton H. Hartson.)

speaking finally for the Office of Price Administration, and that we were in communication with the Regional Office and that the final answer would have to come through that office, or from that office. That is my best recollection.

Q. Did you give him to understand they would be notified when you heard from the Regional Office.

A. Well, I am not clear about that, but may I say I think he must have known it, because it was a very hot subject in the office at the time, and we told all these people about the same thing.

Q. You did communicate with the Regional Office about it?

A. Oh, yes, there must be correspondence I signed. No doubt I signed the letters as Chief Attorney, but they were prepared by Mr. Sholley. I don't believe I ever prepared a letter on this subject.

Mr. Hughes: That is all.

The Court: How long will it take you on your cross examination?

Mr. Agnew: Less than five minutes.

The Court: Very well.

Cross Examination

By Mr. Agnew:

Q. Judge, I believe you stated that at the particular time these leases were up for all these companies, there was [107] in your office some state of uncertainty as to what interpretation would be

(Testimony of Clinton H. Hartson.)
made in regard to the matter finally, by the National Office?

A. I think that is true. That is my recollection.

Q. And how long did you remain in the office, Judge, after that? Were you there in August?

A. Yes, until September 17th. I think I left on September 17th.

Mr. Hughes: '43?

A. '43.

Q. The record I think shows without dispute, Amendment No. 26 passed, evidently with the purpose of trying to clarify—it was passed effective August 13th, and we received word of it out here about five or six days later, I think August 23rd. Does that fit in with your recollection of the matter? A. Well, that is a complete blank to me.

Q. The leases of the Acme Packing Company, for example were about the same number as this, were they not? A. Number?

Q. In number, yes, that were proposed?

A. I don't recall that. There were quite a number in each case. The packing companies—I think this is responsive to your question—were aggressively taking leases or entering into leases with local butcher shops.

Q. Well, all of the leases of the Acme Packing Company were approved by your office, were they not?

A. Well, I recollect that they were in our opinion locally very much better—that is, more within the regulation.

(Testimony of Clinton H. Hartson.)

Q. More within the regulation in your opinion?

A. That is right.

Q. In any event, the Acme Packing Company were allowed to operate under these leases, were they not?

Mr. Hughes: Just a moment, I don't know what the purpose of this is, what the Acme Packing Company might have done.

The Court: I doubt its materiality.

Mr. Agnew: I would like——

The Court: To show that they were biased and prejudiced against this defendant, out of personal spite?

Mr. Agnew: No, I can't say that. My purpose is to try to develop that there was no real legal difference between the other packing companies' leases and this—no legal difference and no real sane reason why this would not be as acceptable as the others allowed to go and not prosecuted, and no suits brought against them, and they still operate.

The Court: Well, the Court will concern itself with the issues it has before it in the instant case. I think I shall have to sustain the objection.

Mr. Agnew: I think that is all, Judge.

Mr. Hughes: Thank you very much.

The Court: Do you have any more evidence, Mr. Hughes?

Mr. Hughes: I just want to put on Mr. Sholley later, about five minutes.

The Court: I am going to have to let the matter

(Testimony of Clinton H. Hartson.)

go over until tomorrow. We will adjourn court until 10:30 tomorrow morning. [109]

(Whereupon, adjournment was then taken until 10:30 o'clock a.m., December 13, 1944.)

December 13, 1944. 10:55 O'clock, A.M.

The Court met pursuant to adjournment; all parties present.

Mr. Hughes: Your Honor, we would like to call Mr. Joseph for another question or two.

O. B. JOSEPH,

a witness for the Defendant, was recalled for further cross examination and was examined and testified as follows:

Cross Examination—(Continued)

By Mr. Hughes:

Q. Mr. Joseph, I believe you said yesterday that you had been doing business with all of these 25 retailers for some time, and you have a pretty good idea of their business. I wonder if you could tell us whether or not their business for 1941 and '42 was practically the same as '43?

A. No, I could not.

Q. More or less, do you have any idea?

A. No, I couldn't tell that.

Q. Would it be more, do you think, or less?

A. I wouldn't have any idea. [110]

Q. In 1942? A. Well, I couldn't say.

(Testimony of O. B. Joseph.)

Q. Well, now, the foremost period from July till—July the 1st to November the 1st, amounted to, in the sale of meats alone—if 10 percent and less was $19,149.64, then the gross sales in meats during those four months would be $191,000, wouldn't it, for those four months?

A. Approximately, I think.

Q. In fact, it would be more than that, because some of this was based on seven and even as low as five percent? A. That is right.

Q. So you feel you could safely say it amounted to two hundred thousand dollars every four months in the period of nineteen—during the year of 1943?

A. Well, whatever those figures would amount to. I don't——

Q. Well, do you have any idea that 1942 was less or more than 1943?

A. Well, I would think that for the same period that it would be more, in 1943.

Q. '43 than '42? A. Yes.

Q. In other words, if it amounted to two hundred thousand dollars, we will say, for the months of July, August, September and October, 1943, you think it might be a little less for the corresponding period of 1942? A. I would think so.

Q. Well, now, you could see two hundred thousand dollars for four months would run around six hundred thousand dollars a year, unless it is seasonal. Would you say [111] the sales are more or less in the winter time than the summer?

A. No, I would not say that there is.

(Testimony of O. B. Joseph.)

Q. They run about the same throughout the year?

A. We had unusual conditions at this time.

Q. I say, does it run usually about the same throughout the year?

A. Well, probably in ordinary times we would be doing a little more business in the winter time than we do in the summer, but these were rather unusual conditions.

Q. Well, if——

A. And people were not able to get the meat. May I go ahead?

Q. Yes, pardon.

A. Many of these markets were trying to keep open by handling poultry and fish, and other times they were only open say a day or two a week. They would spend the rest of their time trying to pick up meat to keep their markets open.

Q. But, to get back to the question, if it amounted to two hundred thousand dollars during the summer, of the four months of 1943, then you would say that the total gross sales would be around six hundred thousand dollars for the year, it was that for three months—I mean four months, then it would be three times that for the year, practically? Would you say that?

A. Well, if the business run the same. I couldn't say what it would be.

Q. Well, looking at it from another standpoint, is there any question in your mind that the total sales from the meat markets and the grocery stores

(Testimony of O. B. Joseph.)

exceeded six [112] hundred thousand dollars a year, both?

A. I don't have any idea what the gross sales were.

Q. Well, you know that amounted to a considerable sum. You figure out the number of stores that had the grocery in connection with the meat market.

A. I think they did a pretty good business.

Q. So you could safely say that it amounted to more than six hundred thousand dollars a year during the year 1943, could you, or couldn't you?

A. I couldn't say.

Q. If it amounted to——

The Court: Let me interrupt you. Did you get a percentage on the grocery sales?

A. No, we had nothing to do with the grocery sales. I don't know anything——

The Court: I wanted to be clear on it.

Q. What I am trying to establish, have you any idea—could you give the Court an idea of the amount of business that was done in the sale of meats during the year 1943?

A. For the whole year, no, I could not.

Q. Well, I think you stated that it runs about the same throughout the year. If it amounted——

A. I said under ordinary conditions, but these were not ordinary conditions.

Q. Well, did you sell more during these months, July, August, September and October, 1943, than you did in '42?

(Testimony of O. B. Joseph.)

A. Yes, we increased our kill quite materially.

Q. I see, you sold more meats when it was scarcer—when it was supposed to be scarcer, during those periods? [113]

A. After we had taken over these markets we sold more meat, yes, sir.

Q. So that you don't want to state you don't know or don't care to give any figures as to whether or not the business for 1943—I am speaking now of the total meat business, whether or not it amounted to around six hundred thousand dollars a year? A. No, I wouldn't say that.

Q. And the same for 1942, you don't know and you haven't any——

A. No, I wouldn't say.

Q. Now, are you familiar with the general method of price control for retail meat markets?

A. Why, I know a little bit about it. I don't follow that.

Q. You have a retail market?

A. We have somebody else that looks after that.

Q. You have a retail market, you say?

A. Yes.

Q. Well, you haven't familiarized yourself with the regulations concerning that?

A. No, I don't pay so very much attention to it. I have a man that doesn't do anything else that looks after that.

Q. Do you know that there are two different sets of prices, depending upon the value of the

(Testimony of O. B. Joseph.)

business done by stores of the type that you claim that you operated during 1943?

A. Well, as I say I am not familiar with that. I don't pay any attention to that part of it.

Q. You don't know that if you operate four more stores as a retailer, that you could not sell at the price that [114] the ordinary retailer sells at?

A. I am not familiar with it.

Q. You are not familar with it?

A. No, I am not.

Q. Did you instruct your managers to reduce the price to—we will say Group 3 of the regulations, Maximum Price Regulation 336?

A. I think you have a copy of the letter of instructions that we gave them.

Q. That was the only instruction that you gave them? A. That was all.

Q. Do you know whether or not these stores continued to sell these meats,—the beef, at the same level of prices after July the 1st, 1943, as it sold before that time?

A. No, I did not check on it.

Q. You don't know anything about it?

A. No.

Q. You did not give them any instructions about that?

A. The letter of instructions I gave them, that is the only instructions that I gave them.

Mr. Hughes: I think that is all.

Mr. Agnew: That is all.

The Court: I just wanted to ask you a question

(Testimony of O. B. Joseph.)

I probably should have asked yesterday. In addition to your own store that you had before this arrangement arose and these 25 stores that came within this plan, you had numerous other outlets, I assume, for your product?

A. Oh, yes, we have several hundred customers [115] that we sell to.

The Court: Well, did you step up the sales to your other customers in proportion to what you did in these twenty-five?

A. No, we did not.

The Court: Did you curtail your sales to them in any way?

A. No, we did not. We took care of them just the same as we had been doing before, but on these stores that we took over, we did supply them with more meat.

The Court: Well, by reason of this taking over these stores, did you go out into the market and buy more livestock?

A. Yes, we killed more.

The Court: And you bought at a price that—there was no ceiling fixed on livestock?

A. No.

The Court: You bought at a price that, if you had sold to these 25 stores as independent retailers, your slaughtering activity would have been a loss to you?

A. Yes, it would. This 10 percent may have seemed like a very high and large amount, but I

(Testimony of O. B. Joseph.)

made several checks on it as the cattle that we were buying—the class of cattle put in there, and for instance, I recall one account that paid us a little over a hundred dollars, and I checked up upon the cattle that we furnished to them from the particular lot that we had at net cost, and we netted about $12.00 for that week.

The Court: Out of the hundred dollars? [116]

A. Out of a little over a hundred dollars we netted about twelve dollars out of it.

The Court: That is all. I just wanted to clear that up.

Mr. Hughes: I think Your Honor asked a question yesterday from which it was—you found I think, that there was 17 of these stores operated were also operating grocery stores.

The Court: Yes.

By Mr. Hughes: (resumed)

Q. Now, I don't know whether you stated or not, the comparative business between the grocery stores and the meat——

A. No, I wouldn't have any idea.

Q. You wouldn't know whether they did a great deal more business than the meat stores, or not?

A. I know this, that the ones that had the groceries were very much pleased to think that they had a market supplied with meat, because it helped their sales of the groceries.

Q. And that is one reason they signed this contract with you, because it helped the sale of groceries?

(Testimony of O. B. Joseph.)

A. And another thing, they were having a very hard time to buy anything, and they would spend more time going down to the street and visiting the other markets, trying to get something, and wasting more time than they could possibly get out of it.

Q. Just a minute. Did you say yesterday that the grocery stores did more business than the meat stores out there, of these 25 retail stores? [117]

A. Did more in the grocery line than they did in the meat line?

Q. Yes.

A. I think they did, yes, sir. I think they are much larger in the groceries.

Q. Based upon that fact then, it would run at least a million dollars a year, wouldn't it?

A. I don't know what the volume is, but I have been around visiting these places and you can observe the amount of business that they are doing, and that is my opinion.

Mr. Hughes: That is all.

Mr. Agnew: That is all.

(Witness excused.)

JOHN B. SHOLLEY,

called as a witness on behalf of the Plaintiff, after being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Hughes:

Q. Will you state your name, Mr. Sholley?

A. John B. Sholley.

Q. Will you spell the last name?

A. S-h-o-l-l-e-y.

Q. Mr. Sholley, what is your occupation now?

A. I am the District Price Attorney of the Seattle district office of the Office of Price Administration.

Q. What are your duties, generally, in connection with that [118] position?

A. My duties primarily are the furnishing of regulations and interpretations of various Maximum Price Regulations to other members of our staff and to the members of the general public.

Q. And how long have you been with the O.P.A. in this capacity? A. Since April 23, 1942.

Q. And during that time you have had occasion to study and interpret the different regulations?

A. I have spent most of my time doing that.

Q. I hand you Revised Maximum Price Regulation 169, covering beef. Was that in effect at all times during the year 1943, Mr. Sholley?

A. It was.

Q. And I hand you also, the consideration for the issuance of Amendment No. 26 to that regulation—just a minute, I will have these identified.

(Testimony of John B. Sholley.)

Mr. Hughes: I think you might fasten them together. They go together.

Mr. Smith: Are those just the regulations?

Mr. Hughes: Yes. Well, there is the consideration.

Mr. Agnew: Is this 26?

Mr. Hughes: Yes.

Mr. Agnew: Is the date of passage of that 26 shown on its face?

Mr. Hughes: Yes. I will offer this, if the Court please.

The Court: It will be admitted in evidence.

(Whereupon, copy of Maximum Price Regulation No. 169 was then received in evidence and marked Plaintiff's Exhibit No. 2.)

Q. I hand you Plaintiff's Exhibit 3, M.P.R. 355 and M.P.R. 336, and ask you if those two regulations were in effect at all times during 1942 and '43?

A. They were not in effect at all times during 1942, nor were they in effect during all times in 1943.

Q. Well, just tell the Court when they were effective as applied to this particular case?

A. The regulation in this form, speaking now of Regulation 336, became effective on June 21, 1943. Regulation 355 also became effective in this form on June 21, 1943. May I amplify that statement? These copies that are here in the exhibit are copies published considerably later, containing more

(Testimony of John B. Sholley.)

recent amendments. They are in the nature of compilations. The general scheme of the regulations has been unchanged since the date that I have mentioned.

Q. Does that regulation provide for, or if you will just tell the Court briefly, the requirements in the regulation concerning the operation of retail stores.

A. Each retailer is required to determine what is called his group of stores. That determination is based upon two factors. In the first place, his annual gross volume, and during the period in issue, the four months period during 1943. The determination was based upon the total gross sales in the particular store during the calendar year 1942, including all food commodities sold in the store. [120]

Q. That would include meat and groceries in this particular case?

A. It would. The other factor is whether the store is an independent or a chain store. A chain store is a group of four or more stores, under one ownership. Two sets of ceiling prices are established. The first set applies to groups one and two, which includes all non-chain stores whose annual gross volume in 1942 were less than $250,000. Group three and four includes all other stores.

I should amplify again. A chain store would be one of group four, whose annual gross sales total more than $500,000.00.

The ceiling prices established for group one and two are in practically all, if not all—in all instances

(Testimony of John B. Sholley.)

higher than the ceiling prices established for group three and four, stores.

Q. Does the regulation, to get down to fundamentals, provide that in this particular case, if the defendant wished to operate these various retail stores as his own, that he couldn't charge the regular ceiling price charged by the ordinary retailer?

A. You mean group one or two, by an "ordinary retailer"?

Q. Yes, group one and two.

A. If the total annual sales of the various retailers during the year 1942 totalled more than five hundred thousand dollars, and a person becomes the owner of that group, he then would immediately be compelled to reclassify each store into group three and four, and abide by the appropriate ceiling prices [121]

Q. Is that ceiling price less to the customer, or more? A. It is less.

Q. It is less?

A. In nearly all, if not all, cases.

Q. Now, Mr. Sholley, during July or the latter part of June, or around the 1st of July, in 1943, did you talk at any time to Mr. Smith or Mr. Joseph concerning these leases and contracts of employment that have been referred to here?

A. I can't recall clearly whether I talked to either one of these two gentlemen on this subject or not. I do recall participating at a conference in which this subject was discussed.

(Testimony of John B. Sholley.)

Q. Handing you Plaintiff's Exhibit 1, dated July the 30th, I believe that letter is,—was that letter dictated by you? A. It was.

Q. And was that the result of any conversation with Mr. Smith and Mr. Joseph?

A. Well, it was an outgrowth, I suppose, of a chain of circumstances which started at that conference.

Q. Could you state whether or not Mr. Smith and Mr. Sholley or either one of them—or Mr. Smith and Mr. Joseph or either one of them understood that?

Mr. Agnew: I object to him stating what was understood.

Mr. Hughes: That is all right.

Q. Is there any other comment you wish to make on that letter, Mr. Sholley?

A. Well, that is a rather broad question, Mr. Hughes. [122]

Q. Well, I want the Court to have all the facts, and if you can make any further comment that would clarify it to the Court—just tell us what caused you to write that letter.

A. Well, I can give you the background, if that is what you wish.

Q. Yes, if you will.

A. On July 9, 1943, a conference was held in the local office of the OPA. Mr. Joseph and Mr. Smith were present. Mr. Hartson, our Chief Attorney at that time was present. I was present. Mr. Eddington

(Testimony of John B. Sholley.)

of our price staff was present. The subject of discussion was the proposed leasing arrangemnts which the James Henry Packing Company at that time were either—had embarked upon or were about to embark upon. Mr. Smith submitted to Mr. Hartson a draft of a lease arrangement, and Mr. Hartson commented adversely upon it, and at the end of the conference my recollection is that Mr. Smith said that he would revise the documents and submit them again. Later that same afternoon, after a rather extended absence from my office, I returned. Mr. Hartson, whose office was adjoining, came in to see me and in his hand he held a copy of two documents, what purported to be a lease and what purported to be a contract of employment, drawn in draft form, representing that the James Henry Packing Company was the lessee in the one instance and the employer in the other instance. Mr. Hartson stated that he had received these documents from Mr. Smith, and requested me to forward them to our San Francisco Regional office for a ruling as to [123] their validity—rather as to whether such transactions as exemplified in the documents would be an evasion of Regulation 169. I agreed to do so, and did despatch the documents that same day.

Thereafter, I received a response from the Regional Office which was to this general effect: each case must be decided on its own facts. It is very dangerous to attempt to look at a draft of a docu-

(Testimony of John B. Sholley.)

ment and say whether or not the transaction is valid.

Within a very short period of time our office received a teletype bulletin from the National Office, which bulletin advised us that the National Office had given this matter very serious study, and had concluded to issue amendments clarifying the evasion clauses of Regulation 169. The general substance of the proposed amendment was outlined.

After receiving this instruction from our National Office, I decided that the proper action to take, on the part of our office, was to immediately advise the James Henry Packing Company that their proposed type of transaction, in the opinion of our National Office was an evasion and that all question would be removed in the very near future by means of what was described as a clarifying amendment. I therefore wrote this letter, a copy of which is the exhibit, and despatched it to Mr. Joseph, and a copy to Mr. Smith.

Q. Did Judge Hartson at any time, indicate to Mr. Smith or Mr. Joseph, that he approved of the lease and the contract of employment?

Mr. Agnew: If Your Honor please, that would [124] be hearsay, and Judge Hartson himself testified on that point. I do not think he could contribute anything to that.

The Court: He may answer, if it was a case where he was present, and——

A. Not in my presence.

(Testimony of John B. Sholley.)

Q. By whom was this letter—this correspondence dictated and handled, Mr. Sholley?

A. You mean the correspondence to which I referred?

Q. Yes. A. It was all dictated by me.

Q. And who had charge of it, as far as determining and interpreting the regulation?

A. Generally speaking, that was my responsibility and duty, subject to Judge Hartson's general supervision.

Q. Now did this amendment in any way change the rule that existed prior thereto, so far as evasion is concerned?

A. Well, that is a question of opinion, Mr. Hughes. Do you want my opinion?

Q. Well, I would be glad——

A. In my opinion it was merely clarifying——

Q. Yes.

A. And did not affect the substantive change.

Mr. Hughes: I think that is all.

The Court: Were you active in writing the next letter that was written about the latter part of August?

Mr. Agnew: That was August 30th.

Mr. Hughes: That is the one by Mr. Stoneman, isn't it? [125]

A. I actually, in person, referred one of the letters written by Mr. Smith or Mr. Joseph which came to my attention—came to my desk, I delivered it to Mr. Stoneman in person and suggested that inasmuch as I had already written this letter of

(Testimony of John B. Sholley.)

July 30th, that I felt that the matter should be transferred to the Enforcement Division from the Price Division.

The Court: And Mr. Stoneman was identified with the Enforcement Division?

A. He was at that time our litigation attorney.

The Court: Now, did you have anything to do with the later communications?

A. Not directly. I did discuss the case with Mr. Stoneman upon two or three occasions.

The Court: Of course the discussions you had with him probably would not be competent, and I would not want it.

A. I did not directly advise him what position to take, nor what steps——

The Court: But I am interested in anything that goes towards establishing willfulness and disregard and avoidance, or anything that establishes good faith, or an effort to honestly comply, and any incidents that bear upon that issue would be of interest to the Court and of value in making a disposition of this case. I want to ask you another question. It is not pertinent to the facts, but it is one that counsel either agree or disagree upon on both sides, and that is, since you have been devoting a great deal of time to the examination of these regulations and likewise the [126] Congressional amendments, is it your contention that the Act as it is now written, when it was re-enacted in June of this year, were these various amendments, insofar

(Testimony of John B. Sholley.)
as penalties are concerned, applies to all pending litigation of a civil nature?

A. Your Honor, I do not think I should speak on that subject. May I explain it this way?

The Court: Well, the Court is perfectly willing to assume the responsibility of termination of that, but I thought perhaps, because both counsel in your trial briefs——

A. Let me say this:

The Court: ——mentioned the matter.

A. We have a division of functions in our office. All problems relating to penalties, what types of actions are applicable and when they are applicable—all that aspect of our program is under the supervision and direction of our Enforcement Division. I as a price attorney do not undertake to advise at all on those subjects, and my comments on that point would be, let me say, not particularly weighty, because I have never actually undertaken to study that particular question as falling within my province. I will, if you wish, give my own opinion, based upon a summary reading, without any study or research.

The Court: I think I would like to have that matter cleared up. If counsel are in accord on it then there is no room for any argument. Both of you have made reference of it in your trial briefs that you submitted to the Court, and the Court has re-examined the [127] Act as it was amended and passed, and what I have in mind particularly is sub-division (e) in Section 205, where all the new

(Testimony of John B. Sholley.)

language was written in and substantial and wide discretion is placed in the trial court as against the previous enactment, or original enactment, where discretion was almost excluded.

Have you examined it, Mr. Smith, or Mr. Agnew?

Mr. Agnew: I think Your Honor is referring to the amendment providing if a defendant——

The Court: The amendment reads:

"If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may"—now that is in the old language. Here is the new language: "within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine; Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of [128] the regulation, order, or price schedule in question was neither willful nor the result of fail-

(Testimony of John B. Sholley.)

ure to take practicable precautions against the occurrence of the violation." That is all new language.

Mr. Agnew: Yes, Your Honor.

The Court: What I am trying to find out is if counsel on both sides are in accord as to whether it is applicable to a set of facts that arose prior to the enactment of the legislation?

Mr. Smith: There is another provision in the act that makes it applicable to pending cases. I interpret that particular provision to mean that Your Honor has discretion, up to the proviso, there, if the defendant shows it was not willful and every precaution was taken, then Your Honor has no discretion. In other words, it could not be a treble award, but some place else in the act it is made applicable to pending cases. I think I can find it. I think we are in accord it is applicable in this case.

Mr. Layman: We would not contend at this time but what the Court could follow the provisions of the amendment in determining the amount of the damages.

The Court: Even though the incident that gave rise to the action came into being prior to the enactment of the legislation?

Mr. Layman: Yes.

The Court: Very well, that covers that phase of it if it becomes material.

Any cross examination, Mr. Smith?

Mr. Smith: No cross. [129]

(Testimony of John B. Sholley.)

Mr. Hughes: That is all.

The Court: You may step down, Mr. Sholley.

(Witness excused.)

Mr. Hughes: That is the government's case. The government rests.

The Court: Do you have any rebuttal, Mr. Agnew?

Mr. Agnew: No rebuttal.

The Court: How much time do you desire?

Mr. Hughes: Personally, I would just as leave to submit it without argument.

The Court: I think I would like to hear from counsel. Since the burden shifted to the defendant, the defendant will have the advantage of the opening and closing argument, then. I will let you proceed until 12:00 o'clock and then we will—I am assuming about fifty minutes or something like that on a side.

Mr. Agnew: I think an hour would be amply sufficient.

Mr. Hughes: An hour on a side?

Mr. Agnew: Yes. I will try to make it less, but sometimes when you get talking you run into more time than you think.

In arguing any case—law case,—I may be putting the cart a little bit before the horse, but I always like to discuss the matter of what findings of Fact the Court would be willing to sign, by sug-

gesting that then sometimes the conclusions of law follow as a [130] very easy matter, if we get settled upon the facts in this particular case.

I have outlined some eleven findings that are short that the defendant would request Your Honor to make, if Your Honor finds that the facts justify such findings.

The first one we ask—that we will ask the Court to make is that the stipulated facts contained in the stipulation and the supplemental stipulation are true and adopted by reference as the findings of the Court.

The second finding——

The Court: The Court has no objection of course, to make such findings.

Mr. Agnew: Or they could be handled in any way that would be proper to repeat them in the findings in drawing them, but I do not believe that it would be necessary because they are part of the record.

The second finding is that during the period in which the Office of Price Administration had failed to place a ceiling upon livestock, it became impossible or greatly difficult for the defendant to process meats and sell at wholesale except at a loss.

Third, because of the shortage of meats it became impossible for the twenty-five retailers involved as parties to these leases, to continue to operate their meat markets and to obtain meat for them.

Third, that retail price ceilings were such that the parties to the leases and agreement believed there was enough margin for both the wholesaler

and [131] retailer to operate if some legal method could be found whereby a portion of the profits of such retail operation could be shared by the wholesaler—that is the third finding, and I think it is very frank on the situation that existed.

Fourth, we request that the Court find that the parties executed these documents openly and not secretly, for the reasons as set forth in finding number three, but without intent to void or circumvent either the letter or spirit of the law, but with the real intent to comply with the law.

Fifth, that prior to the execution of the documents and on or about the 1st of July, 1943, the parties submitted proposed forms to the Office of Price Administration, and made changes as to such forms so as to eliminate criticized items, and that thereafter the corrected documents were executed by the parties.

The sixth finding: That at the time of the conferences of July 1st and thereafter, although the local Office of Price Administration had no doubt and expressed no doubt of the right of a wholesaler to also own and operate retail markets, said office was in doubt as to the interpretation of the National Office in approving the particular method and form of such operation, and in deciding which method and what form would be treated as a prima facie evasion of either the intent or spirit of the law.

Seventh finding, that on July 30th, the local Office of Price Administration notified the defendant by letter, Exhibit—I haven't got the right number of [132] it here, but Your Honor is familiar with the

exhibit, that the San Francisco office of the Price Administration and the National office had disapproved such a form of operation, and that, quoting the language in the letter, that now it would be treated as an evasion. I underlined the word "now" in that finding; that said letter stated that the operation was disapproved largely because of Paragraph 3 of the employment contract which was quoted verbatim in the letter, which was a provision providing that the manager of the local store received his compensation by taking the net profits of operation after the deduction of 10 per cent from the gross; that said letter also called attention to the fact that a clarifying amendment to the regulation upon this subject matter was soon to be issued by the Administrator, and suggested that the parties have a further conference.

As an eighth finding, that the defendant requested delay as to such further conference because of the absence of the president of the company, and also to await the so-called clarifying amendment.

Nine, that on August 23, Amendment 26 was first called to the attention of the defendant, and that later, on August 30th, a letter constituting Defendant's Exhibit blank—that is the Stoneman letter, was delivered to the defendant; that said letter called attention to the clarifying amendment and demanded recision of the leases and contracts within a reasonable time, quoting the letter, and also requested that the office be kept informed from time to time as to the progress made in such recision; that defendant answered said letter on [133] Sep-

tember 2nd stating that the matter was referred to the legal department of the company for opinion as to the recision of the contracts.

Now the tenth finding; that the defendant did not take *immediate to* procure recision of the contracts but instead, modified the contracts on September 24th, so as to attempt to eliminate any receipt by the defendant of a percentage on the retail sales of beef or veal.

Then as an eleventh finding, we ask that the Court find that defendant sought approval of the operation as modified on September 24th, but on failure to obtain such approval from the Office of Price Administration, the defendant procured mutual cancellation and recision on the twenty-five contracts, effective November 1, 1943.

Now that is the findings that we would request. I do not think any of them are out of line in the least bit with the evidence, so we come to the question of what conclusions of law should be drawn from the matter by the Court.

(Whereupon argument continued.)

The Court: Have you a copy of your proposed findings?

Mr. Agnew: In my writing. I doubt if you can read it. I can have it made up this noon and bring it in after the noon recess.

The Court: I will be glad to have it. I think we will take the intermission now until 1:30.

(Recess.) [134]

1:45 O'Clock P. M.

The Court: Did Mr. Agnew finish his argument?

Mr. Smith: I think he did, Your Honor. I think he concluded.

The Court: Well, I will hear from you then, Mr. Hughes.

Mr. Hughes: If the Court please,——

The Court: I wonder if there is a copy of those proposed findings?

Mr. Smith: We will have one very shortly. They are being transcribed now.

The Court: Well, if you have notes on them I would like for you to discuss those from your point of view, and then follow them, because that is a very practical presentation of an argument.

Mr. Hughes: Yes, I am going to leave the interpretation of 205-(d) to Mr. Layman, who will follow me. I just want to outline the argument here.

(Whereupon argument by respective counsel.)

The Court: This matter is not an easy one of disposition. Like every lawsuit, there are substantial reasons that persuade both the litigant and counsel that they are on the right side.

I might state at the outset that I intend to make a disposition of this case now, though, of course, will make no formal findings and conclusions, and will permit counsel to submit them later, but will state generally what the facts are as I now find them, and the [135] conclusions of law that we draw from them.

I think it is quite appropriate, because of the importance of this case to the defendant as well as to the government, to touch briefly upon what the objectives of this unusual, emergent and drastic legislation were and are. When it was enacted, it was sought to surround it with all sorts of safeguards, because it was such a departure from legislation, affecting as it does the most intimate private affairs of the American citizen, and it was expressly written into the act that it would automatically end at a given time, unless Congress saw fit to renew it. It is purely a legislative enactment that Congress in its wisdom thought was essential for the preservation of the nation in a period of crisis, and some of the cases that have arisen under the act and the regulations turned largely upon the issue as to whether the act was one to prevent inflation solely,—and there is some language from the courts indicating that was the primary purpose, and that fact is doubtless true in the particular cases being considered. The purposes of the act, however, are substantially broader than that of merely preventing inflation. The very first sentence of the act indicates that. "It is hereby declared to be in the interest of the national defense and security and necessary to the effective prosecution of the present war." Now, this is the broad purpose of the act, and then: "to stabilize prizes and to prevent speculative, unwarranted, and abnormal increases in prices and rents; to eliminate and prevent profiteering, hoarding, manipulation, speculation, and other disruptive practices."

After this act had been in effect from the date [136] of its enactment until the date of expiration, as fixed by its own terms, Congress saw fit to extend it, and to modify it, and to alter some of the drastic provisions, but still keep within its framework such parts of it as would make effective the major objectives. Among other things, they wrote new language into the act, conferring somewhat greater discretionary powers upon the courts.

I said at the outset this is a most novel and unusual piece of legislation, and confers tremendous powers that ought only to be exercsied by those who are given the responsibility of enforcing them with great circumspection and full knowledge of the effect that mistakes, if they make such, might have.

The courts have been and are even now, denied the right to pass upon a regulation promulgated by an administrative official as to its constitutionality, or as to its effect, and likewise as to the act itself. In fact, some judicial construction has gone so far even in a criminal proceedings to hold that in defense of such criminal action, the accused could not interpose a constitutional question in the lower courts, and there has been set up by Congress in the enactment of this act a special court, to pass upon such questions.

The enforcement of the act has resulted in numerous unusual situations. It has resulted in a great amount of hardship, in some instances completely wiping out some peoples' business and their fortunes, while on the other hand it has made it possible for others to make fortunes. It has led to a new

specie of crime and lawlessness known as "Black Market". [137]

The act provides for both criminal and civil proceedings. In the instant case, the evidence indicates that the government sought first to proceed on the criminal side of the law and secured an indictment. That this indictment was later dismissed is not a matter of concern to this Court in making a disposition of the instant case, nor to pass upon what causes there were that motivated or brought about the dismissal of the indictment. It is enough to say that the evidence introduced in the case at bar would, in the judgment of the Court, not have sustained that degree of willful and unlawful violation of the act to have supported a criminal prosecution or conviction, but that is quite another matter from passing upon the question as to whether or not there was this civil violation.

If these two instruments that are called the "lease" and the "contract of employment" were effective instruments for what they purported to be, then I do not believe there was a violation. The terminology of the lease and of the contract of employment is not at fault. The draftsman of both is to be complimented upon his knowledge of the law involving contracts, both for the leasing of premises and the employment of persons, but we must go farther than a mere superficial examination of the documents themselves.

Here are the undisputed facts of the situation that confronted the defendant company — the James Henry Packing Company, when the law in question

became effective, and the various regulations were put into operation, and particularly M.P.R. 169 was announced and made effective; the defendant, a meat packer, which found the outlet of its [138] product through some two or three hundred customers, I think the evidence disclosed, who were retailers, and in addition to those two or three hundred customers one of their own stores that they owned exclusively —found that by reason of the situation growing out of these regulations and maximum ceiling prices and there being none whatever upon livestock because livestock was considered an agricultural product—it could no longer process and sell certain grades of beef, except at a loss. This created a situation where the packers and the smaller packers, particularly, could not supply the trade and sell their products within the limitations fixed by the regulations—that is, Regulation 169 and others that were pertinent, without suffering a loss, particularly as to certain types and grades of meat. If they could not slaughter and could not sell, then the customers would be lost, and their business and its future were being jeopardized.

This defendant, with advice of able counsel, gave thought and consideration to the regulation without an intent to violate it, but with a desire to comply with it and yet continue to remain in business and make a profit, and the testimony of Mr. Joseph, its manager, was in substance, at least, that that is what gave rise to these leases and these contracts of employment. Had it not been for the

Emergency Price Control Act and the O.P.A. regulations, such an arrangement would never have been thought of, and immediately when they ceased, it is clear to the Court, the arrangement would have been cancelled.

Now let us see for a moment, from all of the facts and circumstances surrounding these transactions, if [139] they were in fact an acquisition such as would make the packing company the real party not only in interest, but in control and possession, and having in addition to the advantages of control and possession, all of the liabilities

I am constrained to find that situation is not supported by the facts here, and my reasons for so finding are that Mr. Joseph testified that out of his two or three hundred customers who were retailers, he selected twenty-five who were strategically located in the city so that they might maintain the business of the packing firm in supplying wholesale meat, and they might have at least that much of an advantage when the war is over and the restrictions were gone. The retailers selected were placed in a decidedly advantageous position over the other two hundred and fifty or two hundred and seventy-five that were not chosen.

While there is no direct evidence, it is only a logical and reasonable inference from the evidence that some representative of the defndant company stated to these retailers in substance that "Your margin of business will be greatly increased, even enough that you can pay a percentage of your gross receipts from your meat market operations, and

still be money ahead and still maintain your customers", therefore, this lease agreement. It is clear to this Court that the lease, insofar as actual possession, control, direction and operation, and the employment contract insofar as directions and orders and management are concerned, were never contemplated as effective instrumentalities for taking over by the defendant company of the various meat markets. Not a thing was done during the whole four-month period to [140] indicate such action. The same operator and owner at the time of the execution of the instruments has continued to be such throughout the whole period of time here involved.

The rentals that were fixed, the Court must find were arbitrarily fixed and were never fixed with any thought of actually being paid, because there is no basis at all to show why the minimum rental should be $25.00 as indicated by the stipulation in the evidence, and the maximum, $35.00, when some of the places did a volume of business that went three and four times, according to the evidence, what it did in others. I must hold that neither the lease nor the contract of employment, created what they purported to create on their face, and they were merely the outgrowth of activities on the part of this defendant to meet a situation that confronted it by reason of an uncontrolled maximum price on livestock, and selling its product as a processor under a controlled and maximum price made it difficult to continue processing meat at a profit. It is true the public were not compelled to pay any additional sum or any appreciable additional amount for the meats they bought, but the dealer was com-

pelled to part with a margin of his gross profits ranging from 5% late in these transactions, to 10% at the beginning, and he parted with that by giving it to the defendant. The defendant took such percentage of profits openly and in good faith, not with an intent to commit an offense. When I use the words "good faith" I use it in counterdistinction to the word "willful" and "malicious" and "intentional". He took it to make up the losses that he would sustain if he went out in the open market and bought livestock at the then going price, and it thus becomes a [141] method of indirection, in permitting the defendant to dispose of his processed beef products at a price in excess of the maximum, and therefore, it is a violation.

Under the law that existed prior to the time Congress amended it in July of 1944, this Court would have no discretion but to assess the damages and the penalties. With the amendments and with the provisions in the act as I undertsand it, that even though all of the sales herein involved occurred prior to the date when the act was amended, they are still covered by it, and the issue of good faith, or as to whether or not the act was willful and the result of a failure to make practical precautions against the occurrence of the violation, becomes an issue here, and upon that issue turns the question as to what penalties, if any, should be assessed, and for what period of time.

I have already stated that I think the defendant initiated this novel and unusual procedure for the purpose of self-protection and self-preservation,

and probably the suggestion came from others who were trying to do likewise, but that, of course, does not make it valid. In fact, it only goes to show to this Court how readily, if such undertakings were condoned and judicially approved, there would be a breakdown in the effective enforcement of this price control act.

The situation was, in the mind of this Court, substantially different in October from what it was in July. It cannot only be argued with much force, but I do not hesitate to find as a fact, there was neither a willful violation nor was such violation the result of a failure to take practical precautions against the occurrence of a violation [142] during the month of July.

The defendant through its president and manager, and through its counsel, sought to work out some plan whereby they would not violate the law, and yet be able to carry on their meat processing business at a rate and to a degree sufficient to insure its survival, so I feel in making a disposition of this case that I should divide the whole period of time into lesser periods. The fact that the government has seen fit to aggregate four months and eight days into one action, I do not think, under the broad discretionary powers now given by the act would prohibit me from making segregation of such periods, where the evidence discloses a different situation prevailed. I do this on the ground that on July 30th a letter went forward from O.P.A. officials, as shown in this record, indicating clearly

that the O.P.A. questioned this entire procedure, and at the very least, it should have been a warning. For that reason I think that the overcharge made during the month of July should be measured by the amount thereof, which would be the damage without penalties. It is evident that upon the receipt of that letter there was some condition about Mr. Joseph's health, or something of that nature, that was testified to in this record that caused him to take no immediate action. That would be no excuse whatever in a matter of so vital importance as this is; however the O.P.A. took no action, but by August 30th there was again a letter from them to the defendant which is in the file here and has been admitted in eidence, and which again clearly indicates that the arrangement could not be approved, and that the conduct of the business under this arrangement would be looked upon [143] and taken as an evasion and a violation, and while there is some language by the writer of that letter that there might be further conferences, that is not sufficiently persuasive for me in the exercise of discretion to say it meant that the same practices should continue thereafter indefinitely, however because of the writing of that letter and the negotiations which had taken place wherein the defendant was seeking to take reasonable precautions to avoid becoming subject to damages and and penalties, cause me to hold that for the month of August, likewise, they should be liable for the amount of the overcharges.

Now, as to September, October, and such days in November as are involved—in some instances they apparently run up to the 8th of November—from September 1st until the conclusion of these transactions, I find that violations were knowingly made, and were the result of a failure to take practical precautions. All precautions that could have been taken were not taken from September 1st and for that reason the judgment will be the amount of the overcharges plus 50% in addition, whatever that may be, or one and a half times.

Coming to the suggested proposed findings, I have in a general way in announcing through this oral decision, covered a part of them. I do not know whether it would be helpful to counsel to go over them as they have been here submitted, because I shall expect you to submit findings in accord with present pronouncement, if you possibly can work them out agreeably. Otherwise, if you cannot, I will set a date for a hearing to make fromal findings. If you cannot agree as to them, of course the responsibility falls upon [144] the Court itself, but the practice in this jurisdiction and in this state has been to leave the preparation of them very much to counsel, for approval by the Court.

Finding number one as suggested by the defendant here—this might be made, reads: "The Court finds that the facts stipulated in the original stipulation and supplemental stipulation are true and are hereby adopted by reference as findings of the Court". I have no hesitancy in making such a finding.

Now finding two suggested that: "During the period in which the Office of Price Administration failed to place a ceiling upon the livestock, it became impossible for the defendant to process meats and sell at wholesale, except at a loss". I hesitate to make so broad and comprehensive a finding, because the evidence was not sufficient in detail to warrant the Court in finding that issue. I would have no hesitancy in making a finding "During that period of time it became impossible for the defendant to process types of meats."

Mr. Smith: Substitute the word "beef".

The Court: There is a wide distinction between different types of beef. There is a certain high grade beef that they could not profitably process. There is certain low grade beef they could, but I think that should be modified——"certain types of beef", or "certain high grade types of beef."

The third one: "The retail price ceilings were such that the parties to the leases and agreements believed there was enough margin for both the wholesaler and retailer to operate if some legal method could be found—if some certain portion of the profit of the retail operation could [145] be received by the wholesaler". The Court of course cannot make that findnig consistent with the oral pronouncement just made. The retail price ceilings were such that if the retailers selling the beef were willing to share the margin with the wholesalers, or with the processors, and the processors could operate in this higher type beef, that is the thought that I have expressed in my oral state-

ment, and because I have had to, and have repudiated both the leases and agreements as effective instrumentalities that created the situation they purport to create.

The next suggested finding is: "The parties executed the leases and the agreements of employment openly, without concealment for the purposes set forth in finding number three, did so without an intent to avoid or circumvent the letter or spirit of the law, but with actual intent to comply with the law." I cannot make such finding.

The next one is: "That prior to the execution of the documents and about July 1st the parties submitted proposed forms to the Office of Price Administration with suggestions for change made by the officers." To that extent I can make that finding. "That the changes were complied with"—that part of the finding would have to be stricken because the testimony is that the suggestion was made that a time limitation—I think it was 30 days, within these lease forms, was objectionable, and they knew that it was objectionable, but there was no testimony that the OPA said if that were changed they would approve it, and I do not want to leave that inference here, so if you want to submit findings as I have suggested, I will consider them.

The next suggestion is: "That at the time of the [146] conference of July 1st, and continuing thereafter until the receipt of the Amendment No. 26, although said local office had no doubt of the right of

the wholesaler to own and operate retail markets, said office was in doubt as to the interpretation of the national office concerning the subject matter, of approving the particular method and form of such operation in deciding which forms would be treated as prima facie evasions in the spirit of the law." I will have to decline to make such finding.

The proposed finding: "That on July 30th, the local Office of Price Administration notified the defendant by letter that the national office had expressed disapproval of the form of operation, and that now such forms would be treated as an evasion; that said letter stated that said disapproval was based upon paragraph three of the employment contract, said letter quoting said paragraph in full, and which paragraph provided that the manager of the outlet would receive his compensation by taking the profit remaining after deducting all costs of operation, of ten per cent; said letter further called attention to the fact that a clarifying amendment would soon be issued by the Administrator, and ended with the suggestion that there be a further conference between the parties." Well, I could not make a finding as comprehensive as that, because the inferences suggested therein are not the inferences that the Court draws from all the facts and circumstances in this case, so I decline to make such finding.

As to the next suggested finding: "Defendant requested delays as to such further conferences because of the absence of the president of the company, and also to await [147] the so-called clarify-

ing amendment." The first part of that states a fact that I have no hesitancy in finding—the absence of the president. I think there was evidence his absence was due in part to illness—I am not so sure, but I cannot find and do not find from the evidence submitted in this case that the amendment was ever represented as being a liberalizing amendment.

The next proposal is: "On August 30th the defendant was notified by letter, and that said letter further demanded defendant procure mutual recision of the leases within a reasonable time and requested notice from time to time as to the progress made in that regard"—I have no hesitancy in finding in substance at least, what is included in that, because the Court assessed its damages upon that idea.

We then have the proposal: "The defendant answered said letter on September 2nd, stating that the matter has been referred to the legal department of the company for opinion as to the recision of the contracts. Defendant did not take immediate steps to procure a recision, but instead, modified the contracts—" I do not think that finding is necessary, and:

Your 11th finding, the substance of that is not in dispute at all. If it is material, it might be submitted. It was not November 1st. The stipulation in the exhibit would indicate it was about November 8th.

Mr. Smith: I think, Your Honor, I am not sure the evidence shows it, but I think the defendant

derived no benefit from any of the leases subsequent to November the 1st.

The Court: If that is true, then these—I am [148] taking these exhibits that were attached to the complaint—take each one of these various places of business up individually and there is a breakdown, and then your stipulation refers to them, and it is stipulated they represent the facts. Now, then, if it is a fact that there is nothing after November 1st,—the exhibits disclose sums following November the 1st.

Mr. Smith: There might have been some receipts, but not for business transacted——

The Court: Some amounts are substantial. One for $88.00, and one for $63.00, and another one for $10.00, and another for $30.00, and so on, but that is a matter that counsel can work out between them as to——

Mr. Agnew: I have one thought I would like to ask Your Honor about, and that is the matter of penalty during the month of September. The letter of August 30th which is just before September 1st notifies us for the first time about the—what they called their clarifying amendment. They used that language about it, that it was now in effect, and they end the letter stating "We therefore shall require a recision of these contracts. Please let this office know from time to time what progress you are making." I think at least some reasonable amount, before penalties are attached in the month of September, should be allowed for this recision.

The truth is, they did not proceed immediately, and tried to stage an argument, but for——

The Court: The Court of course has relieved you of any penalty in July and any penalty in August.

Mr. Agnew: I thought the same reasoning would justify no penalty in September, to allow us to comply with [149] that letter. They said "We will give you a reasonable time," and a reasonable time I would say, would be the following month to get rid of it, and we would still be without penalty under the way they expressed it—"We expect you within a reasonable time to secure revision of these agreements."

The Court: What have you to say to that?

Mr. Hughes: I would suggest in view of the fact that they had never returned any part of this, that they never intended to comply with that part of it, beginning in September, and I do not think they are entitled to any benefit from that because a little different situation, as Your Honor suggested, might apply after September the 1st, or after August the 30th, and——

The Court: That letter is dated August 30th is it?

Mr. Hughes: August 30th.

The Court: Well, will you let me see that again?

Mr. Agnew: You probably would have—there wasn't any profit, as was demonstrated by our testimony, in addition to this. Whatever profit it was, was approximately 60% income tax charged by the

United States Government, charged already, and I do not believe they would return that part of it.

The Court: The letter is Defendant's Exhibit A-3, and the paragraph pertinent is: "The arrangement thus constitutes an evasion of the ceilings fixed in the regulation and in our view must be terminated.

"A reasonable time will be allowed to effectuate a termination before we proceed with legal action. We [150] shall expect, however, to be kept advised of your program in bringing about recisions."

I am rather persuaded to the view that this letter would seem to indicate that some time should be allowed. I am taking into consideration, too, the warning that was given a month earlier.

Mr. Layman: Isn't that time for taking legal action, rather than fixing damages? It seems to me——

The Court: Doesn't your letter carry the inference as to what was a reasonable time? Under the circumstances, it would appear to the Court that two weeks would have been a reasonable time to have terminated these contracts with such warning, but whether that was done, doesn't the letter carry with it the inference that the OPA would not take any action for a reasonable time and under the circumstances two weeks would be reasonable?

Mr. Layman: I don't think so, Your Honor. We might still have claimed damages, but we might not have brought suit for a period of several weeks. There is no waiver of the right to claim damages noted. We claim clear back to July 1st.

The Court: I think that I shall modify the judgment that I have already suggested, by eliminating any penalties, above the over-charges on the business transacted up until the 15th of September. I fix the 15th of September as the time when penalties are to be assessed.

Mr. Smith: There were twenty-five cases there. That is not a small task.

The Court: But it was all in one city and they could all be seen in one afternoon if the weather was good. [151]

Mr. Smith: Some declined to answer.

Mr. Hughes: I am afraid, Your Honor, this is going to be pretty hard to figure because these payments were made weekly, and during each month, and to cut off in the middle——

The Court: Whatever would constitute the two-week period in September, and if you can agree upon the calculation and the facts in so far as you can, and where you cannot agree, then decide upon some date I can probably come back up here and sign findings of fact and conclusions of law, and the judgment.

Mr. Smith: Your Honor please, at this time I think it is proper to ask Your Honor to look at Section 107-E-1 of the amendment, which permits us, with Your Honor's consent, to attack the validity of the regulation in the Emergency Court of Appeals where it says "within five days after judgment," whether that means today or the day the judgment is formally entered, I am not sure. I want to be sure of it.

The Court—One O—section?

Mr. Smith: Section 107 of the amendment,—1-A——

Mr. Layman: If the Court please, that is on pages 14 and 15 of the pamphlet I handed to you yesterday, Section 204.

The Court: It is 204 here.

Mr. Layman: 204-E-1. You are referring to the stabilization act.

If the Court please, we would be willing to concede the time would run from the date the formal judgment is entered. [152]

Mr. Smith: I would not be satisfied with that, Your Honor, because that would be something for the Emergency Court to pass upon, upon a showing that we had some excuse for not filing a protest, why I think Your Honor has no discretion but to grant us permission to file this complaint in the Emergency Court of Appeals, and I believe this is the time to secure that consent.

Mr. Layman: If the Court please, if this is going to be considered an application to file now, there are so many questions, we would like to have an argument set for that point.

The Court: I do not think the time could possibly start to run until the formal judgment is entered.

Mr. Smith: Until the formal judgment is entered?

The Court: Yes, because the Court may completely change its judgment, and give consideration to a motion for a new trial, and subject to a change

in viewpoint, this time element could not possibly apply to an oral pronouncement making a disposition of the cause.

Mr. Smith: If that is Your Honor's ruling, that is satisfactory. It is in the record. I just wanted to make sure of it.

The Court: I am not deciding now, because I just had this brought to my attention, that it is either mandatory or discretionary with the courts to permit such an appeal. I do not know—I do not know because I have not had an opportunity—whether the situation in the instant case, whether it brings it within the provisions of this particular enactment in reference to an appeal to the [153] Emergency Price Control Court.

Mr. Smith: Then we will present the application at the time of the presentation of the judgment.

The Court: Yes. Let me ask, for my own information, counsel on both sides who have studied the law and the decisions that cover the instant situation, is it your belief that you could do two things at the same time; that you could take the matter to the Emergency Court of Appeals and at the same time to the Ninth Circuit Court of Appeals?

Mr. Smith: That is the way I read the law. We are not permitted to attack the validity in any other court except the Emergency Court, and we are permitted to appeal this case.

The Court: Is that your view of it?

Mr. Layman: I couldn't say.

Mr. Agnew: I was rather inclined to the view personally that it would operate as a stay, and that

the appeal to the Circuit Court would wait. That is, it would operate as a stay of judgment.

Mr. Layman: No.

The Court: Well of course you have the Rules of Civil Procedure to consider and the time limit fixed therein for appeals.

(Case closed.)

[Endorsed]: Filed May 31, 1945. [154]

[Endorsed]: No. 11089. United States Circuit Court of Appeals for the Ninth Circuit. Chester Bowles, Administrator, Office of Price Administration, Appellant, vs. James Henry Packing Company, a corporation, Appellee. James Henry Packing Company, a corporation, Appellant, vs. Chester Bowles, Administrator, Office of Price Administration, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed July 2, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11089

CHESTER BOWLES, Administrator of the Office of Price Administration on Behalf of the UNITED STATES OF AMERICA,
Appellant and Cross Appellee,

vs.

JAMES HENRY PACKING COMPANY,
a corporation,
Appellee and Cross Appellant.

STATEMENT OF POINTS TO BE RELIED UPON

Appellant and Cross Appellee, Chester Bowles, Administrator of the Office of Price Administration, will urge and rely upon the following points on the Appeal taken by him in this cause, to-wit:

1. The Court below erred in awarding judgment in favor of plaintiff and against defendant for only the excess over the legal maximum of the prices charged by defendant on the sales made prior to September 15, 1943 which are referred to in the Findings of Fact and Conclusions of Law.

2. The Court below erred in awarding judgment in favor of plaintiff for only $21,726.89.

3. The Court below erred in failing to award judgment in favor of plaintiff for three times the excess over the legal maximum of the prices charged

by defendant on all of the sales referred to in the Findings of Fact and Conclusions of Law whether made before or after September 15, 1943.

GEORGE MONCHARSH
Deputy Administrator for Enforcement
FLEMING JAMES, Jr.
Director, Litigation Division
DAVID LONDON
Chief, Appellate Branch
ALBERT M. DREYER
Attorney
Attorneys for Appellant and Cross Appellee.

[Endorsed]: Filed August 9, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PORTIONS OF RECORD TO BE PRINTED

Appellant and Cross Appellee, Chester Bowles, Administrator of the Office of Price Administration, hereby designates the following portions of the record herein to be printed:

1. Plaintiff's Complaint
2. Defendants' Amended Answer
3. Stipulation, dated October 11, 1944, with attached Exhibits
4. Supplemental Stipulation dated November 15, 1944

5. Defendants' Motion to Dismiss
6. Order Denying Motion to Dismiss
7. Findings of Fact and Conclusions of Law
8. Judgment
9. Transcript of Testimony and all Exhibits introduced in evidence.

GEORGE MONCHARSH
Deputy Administrator for Enforcement
FLEMING JAMES, Jr.
Director, Litigation Division
DAVID LONDON
Chief, Appellate Branch
ALBERT M. DREYER
Attorney

Attorneys for Appellant and Cross Appellee, Chester Bowles, Administrator.

[Endorsed]: Filed Aug. 9, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLEE AND CROSS-APPELLANT'S AMENDED STATEMENT OF POINTS

Following is a statement of the points upon which appellee and cross-appellant intends to rely for a reversal of the judgment entered against it, to-wit:

1. The action was brought without authority from the plaintiff, and defendant's motion to dismiss should have been granted.

2. The leases to the defendant referred to in the pleadings were bona fide and bound the defendant to all legal liabilities and responsibilities of a lessee in possession, and defendant made no sales of beef or veal to its lessors or market managers and, hence, did not evade or violate any provision of the Emergency Price Control Act of 1942 or regulations issued thereunder.

3. In leasing retail markets and distributing inspected and graded beef through them to the public at ceiling prices, the defendant was complying with the Emergency Price Control Act in preventing "hardships to persons engaged in business," and assisting "in adequate production of commodities," and preventing inflation, as such purposes are stated in the preamble of said Price Control Act.

4. In distributing inspected and graded meat to the public through its retail markets at ceiling prices or less, the defendant was assisting law enforcement authorities in eliminating the "black market."

5. Prior to and during the operation of its retail markets, defendant sought advice and guidance from the local office of the plaintiff, and at all such times in good faith endeavored to comply with the Price Control Act and its regulations, and, upon notice from the local office of the plaintiff that it considered defendant's retail market operations forbidden by the Act, requested cancellation of its leases from all lessors and discontinued its operation of the markets.

6. Defendant did not evade or violate the Emer-

on inflation, the prevention of which is the prime gency Price Control Act, as it sold beef to ultimate consumers only at ceiling prices or less, and only the price to ultimate consumers has any bearing purpose of the Price Control Act.

7. Even if the leases are disregarded, and it is assumed that the defendant Packing Company sold meat to its various markets, there was no violation or evasion of Maximum Price Regulation 169 prior to the letter from the local enforcement division of plaintiff dated August 30, 1943 (Defendant's Exhibit A-3) and a reasonable time thereafter, as not until then was the defendant Packing Company furnished with its long requested interpretation of the Regulation, and it was allowed "a reasonable time" to effectuate termination of the leases.

8. Upon securing an interpretation of the Regulation, the defendant Company proceeded with reasonable promptness to comply with the interpretation and did not fail to take practical precautions against the occurrence of a violation, and did not wilfully violate or evade the Regulation.

9. Assuming that the trial court was correct in finding that the defendant Company had evaded or violated the Regulation, its conclusion was erroneous and the judgment rendered excessive, because the judgment was for the total gain of the defendant Company realized by the operation of the retail markets from pork, ham, bacon, lamb, lard and other commodities furnished by the defendant Company, and only the alleged overcharge on beef and veal is involved in the lawsuit, as Regulation

169 applies only to beef and veal; and the trial court arbitrarily and wrongfully treated the entire profit as an overcharge on beef, notwithstanding the supplemental stipulation wherein it was agreed that beef constituted but 57% of all meats delivered to said retail markets.

JAMES HENRY PACKING COMPANY
Appellee and Cross-Appellant
By ALMON RAY SMITH
HENRY CLAY AGNEW
Its Attorneys.

[Endorsed]: Filed Aug. 13, 1945. Paul P. O'Brien, Clerk.

No. 11089

In the United States Circuit Court of Appeals for the Ninth Circuit

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

JAMES HENRY PACKING COMPANY, A CORPORATION, APPELLEE

JAMES HENRY PACKING COMPANY, A CORPORATION, APPELLANT

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT, CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
MILTON KLEIN,
Director, Litigation Division,
DAVID LONDON,
Chief, Appellate Branch,
SAMUEL ROSENWEIN,
Attorney,
Office of Price Administration, Washington 25, D. C.

HERBERT BENT,
Regional Litigation Attorney,
San Francisco, California.

INDEX

AUTHORITIES CITED

678510—46

Cases—Continued

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11089

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

JAMES HENRY PACKING COMPANY, A CORPORATION, APPELLEE

JAMES HENRY PACKING COMPANY, A CORPORATION, APPELLANT

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT, CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

This is an appeal by the Price Administrator from that portion of a final judgment (R. 35–36) entered in a treble damage action brought by the Administrator pursuant to Section 205 (e) of the Emergency Price Control Act (50 U. S. Code App. Section 925, 56 Stat. 23) which awards damages in the sum

of $21,726.89 instead of $57,448.92 as demanded in the complaint (R. 2–4).[1]

JURISDICTION

Jurisdiction of the District Court was invoked under Section 205 (c) and 205 (e) of the Act and the jurisdiction of this Court is invoked under Section 128 of the Judicial Code (28 U. S. Code, Section 225). The judgment was entered on January 19, 1945 (R. 36). Notice of appeal was filed April 6, 1945 (R. 37).

STATUTES AND REGULATIONS INVOLVED

The action involves the Emergency Price Control Act of 1942 and Maximum Price Regulation No. 169—Beef and Veal Carcasses and Wholesale Cuts, as amended (9 Fed. Reg. 1121) issued under the authority of that Act. Section 205 (e) of the Act reads as follows:

> (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, [within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the

[1] The James Henry Packing Company has filed notice of cross-appeal from the entire judgment (R. 40–41). In this brief, the Administrator is designated as plaintiff; the James Henry Packing Company as defendant.

court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilfull nor the result of failure to take practicable precautions against the occurrence of the violation.][2] For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the

[2] As amended by Section 108 of the Stabilization Act of 1944 (June 30, 1944, c. 325, Title I, Section 108, 58 Stat. 640). Formerly read:

"* * * bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum prices, whichever is the greater, plus reasonable attorney's fees and costs as determined by the court."

United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered. [The amendment made by subsection (b), insofar as it relates to actions by buyers or actions which may be brought by the Administrator only after the buyer has failed to institute an action within thirty days from the occurrence of the violation, shall be applicable only with respect to violations occurring after the date of enactment of this Act. In other cases, such amendment shall be applicable with respect to proceedings pending on the date of enactment of this Act and with respect to proceedings instituted thereafter.]

The Regulation prescribes the maximum legal prices which may be charged for the sale and delivery of beef and veal carcasses and wholesale cuts (Section 1364.451) and prohibits sales above the maximum prices (Section 1364.401). Section 1364.401 of the Regulation reads, in part, as follows:

Prohibition against selling beef and veal carcasses and wholesale cuts, and processed prod-

ucts at prices above the maximum—(*a*) *Beef carcasses and wholesale cuts.*—On and after December 16, 1942, regardless of any contract, agreement, or other obligation no person shall sell or deliver any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by § 1364.451; and no person shall agree, offer, solicit or attempt to do any of the foregoing. The provisions of this Revised Maximum Price Regulation No. 169 shall not be applicable to sales or deliveries of beef carcasses or beef wholesale cuts to a purchaser, if, prior to December 10, 1942, such beef carcasses or beef wholesale cuts have been received by a carrier other than a carrier owned or controlled by the seller, for shipment to such purchaser. "Person," "beef carcass," and "beef wholesale cut" are defined in § 1364.455.

* * * * *

Another provision of the Regulation (Section 1364.406) forbids evasions of the price limitations set forth in the Regulation. Prior to July 1, 1943 (the violations here occurred between July 1 and November 8, 1943), Section 1364.406 (8 Fed. Reg. 4097) read as follows:

§ 1364.406 *Evasion.*—(a) The price limitations set forth in this Revised Regulation shall not be evaded, either by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to beef, veal, or processed products

separately or in conjunction with any other commodity or services, or by way of any commission, service, transportation, wrapping, packaging or other charge, or discount premium or other privilege, or by tying agreement or other trade understanding, or by changing the selection of, grading, or the style of dressing, cutting, trimming, cooking or otherwise processing or the canning, wrapping or packaging of beef, veal or processed products, or otherwise:

* * * * *

(b) Specifically, but not exclusively, the following practices are prohibited:

* * * * *

(8) Charging, paying, billing, or receiving any consideration for or in connection with any service for which a specific allowance has not been provided in this Revised Maximum Price Regulation No. 169.

Section 1364.406 was amended on August 16, 1943 (8 Fed. Reg. 11445) to add the following subdivision:

(c) Any transaction, device or arrangement whereby a person who sells, transfers, or delivers beef or veal to a retail establishment not wholly owned and operated by such person receives for the beef or veal a greater realization than he would be entitled to receive under this regulation for the sale of such beef or veal to a retailer is a violation of this regulation and is prohibited.

The Statement of Considerations which accompanied the promulgation of the amendment is contained in the Appendix herein.

STATEMENT OF FACTS

The complaint alleged that the defendant was a corporation engaged in the business of selling beef and veal carcasses and wholesale cuts, as those terms are defined in Maximum Price Regulation No. 169, and that the defendant between July 8, 1943, and November 8, 1943, had sold its products at prices in excess of the maximum legal prices fixed in the Regulation (R. 3). Annexed to the complaint was a tabulation of the amounts charged and received by the defendant from each of its purchasers in excess of the maximum legal price, and the dates of receipt of said excess (R. 5–10). The total overcharges for the four months' period were $19,149.64 (R. 10). The prayer of the complaint was for treble damages in the sum of $57,448.92 (R. 4). The answer of the defendant (R. 11–12) denied the allegations contained in the complaint except that it admitted jurisdiction of the court and the existence of the Regulation. For an affirmative defense, the defendant alleged that the individuals named in the tabulation annexed to the complaint were its employees and that during the period alleged in the complaint it did not sell to them any beef or veal (R. 11).[3] The defendant persisted in that position throughout the trial.

[3] It is important to observe that the defendant did not plead the partial defense (popularly called Chandler defense) that its violation was neither wilful nor the result of failure to take practicable precautions. Compare, *Bowles* v. *Glick Bros. Lumber Co.*, 146 F. 2d 566, 571 (C. C. A. 9th, 1945), cert. den. 65 S. Ct. 1554; *Bowles* v. *Krodel*, 149 F. 2d 398, 399 (C. C. A. 7th, 1945). This failure in pleading was pointed out to the Court by plaintiff's coun-

The evidence at the trial disclosed that the defendant is a corporation engaged in the slaughter house and meat packing business at Seattle, Washington, selling meats and meat products, including beef, at wholesale, to retail meat dealers located at or near Seattle (R. 13). O. B. Joseph is the president and general manager of the company (R. 73), and Almon Ray Smith is its secretary and counsel (R. 153, 138). Prior to July 1, 1943, the defendant found that compliance with the Regulation would compel it to sell its products at a loss (R. 59–60). The defendant therefore sold very little meat prior to that date to retail markets, and these were inferior meats (R. 113). Some time before July 1, 1943, "quite a number" of retailers came to Mr. Joseph to seek his aid and after he had "thought it over for awhile" (R. 80), he decided to see what could be done to furnish the retailers "with good meats and plenty of it." (R. 113).

Two documents were drawn: one, a "lease"; the other, a "contract of employment" (R. 17–20). From

---

sel (R. 82–83). If the Court thereafter heard the evidence relative to the circumstances of the violation for the purpose of properly exercising its discretion, it was error (in the light of the failure to plead) to refuse to exercise that discretion upon the ground that the Chandler defense had been established as to the month of July (R. 200–201). The point is noted here parenthetically because this brief is intended to establish that in the light of the evidence adduced at the trial and the Court's findings of fact, it was an abuse of discretion to award less than treble damages against the defendant for its wilful violation of the Act and Regulation throughout the four months' period, July 1 to November 8, 1943.

July 1, 1943 to July 22, 1943, the defendant entered into the two "agreements" (R. 15) with each of twenty-five customers (out of three hundred customers (R. 197)) selected by defendant "as strategic outlets for its meats" (R. 31, 130). By the terms of the "lease" each retailer demised his premises to the defendant for a term of one year at a monthly rental of either $20, $25, $30, or $35 (R. 15). By the terms of the "contract of employment", each retailer entered into the "employ" of the defendant for a period of one year and agreed, among other things, to "properly manage said meat market, and for his services first party (defendant) shall pay to second party (retailer) all remaining receipts and revenues from the operation of said market remaining after deducting all expenses of operation and costs of merchandise and 10 percent (10%) of gross sales" (R. 19–20). The retailers were informed that if they signed the "lease" and "contract", they would be supplied with the quantities of meat they desired (R. 115), and they were so supplied (R. 111). There was no change in the operation of any store after the instruments were signed (R. 111, 131). The retailers "kept on just the same as they did" (R. 131). Concerning these instruments, the trial court in its oral decision stated:

> * * * the lease * * * and the employment contract * * * *were never contemplated* as effective instrumentalities for taking over by the defendant company of the various meat markets. Not a thing was done

> *during the whole four-month* period to indicate such action. * * *
>
> * * * I must hold that neither the lease nor the contract of employment, created what they purported to create on their face, and they were merely the outgrowth of activities on the part of this defendant to meet a situation * * *. (R. 198.) [Italics ours.]

The conclusion of the Court was overwhelmingly supported by the evidence, succinctly summarized in Findings of Fact, V (R. 30–31):

> That defendant neither during the life of said leases and contracts, nor at any time, paid or provided for the payment of any Social Security tax for the alleged managers or other employees of said stores, as provided by law, nor made any inquiry concerning same. That defendant neither during the life of said leases and contracts, nor at any time, filed any applications with the State of Washington for any license to operate said stores or any of them, as required by the laws of the State of Washington, nor did it pay any retail sales tax on any sales made by said stores, nor make or file any returns showing any sales tax or business tax due said State from said stores, as provided by the laws of the State of Washington; that defendant never inquired of the owners of said stores or of said 25 meat markets concerning any of the terms or conditions of their leases with the owners of said premises; that the amount of monthly rental fixed by defendant as lessee of said stores was an arbitrary sum, no part of which was paid or credited to any of said 25 markets; that defendant never gave to any of said 25 markets any instructions as to

the management or as to the books and records kept or to be kept by said stores, and never authorized any of the obligations incurred by said markets; that all invoices from defendant to said 25 markets covering all meats were exactly the same after the execution of said leases and contracts as before; that no change in the operation of said markets was ever given the public either by notices or by signs of any kind; that the operation, management and control of said 25 markets continued in every way without change after the execution of said leases and contracts as before, except that said 25 markets were required to pay defendant a percentage of their gross sales of all meats in addition to the payment of the ceiling or maximum prices fixed by Maximum Price Regulation 169; that no part of said overcharge has been returned to said 25 markets or paid to plaintiff. That said 25 markets were selected by defendant from several hundred markets supplied with meats by defendant at said time as strategic outlets for its meats.

SPECIFICATION OF ERRORS

1. The court below erred in awarding judgment in favor of plaintiff and against defendant for only the excess over the legal maximum of the prices charged by defendant on the sales made prior to September 15, 1943, which are referred to in the findings of fact and conclusions of law.

2. The court below erred in awarding judgment in favor of plaintiff for only $21,726.89.

3. The court below erred in failing to award judg-

ment in favor of plaintiff for three times the excess over the legal maximum of the prices charged by defendant on all of the sales referred to in the findings of fact and conclusions of law whether made before or after September 15, 1943.

SUMMARY OF ARGUMENT

The evidence at the trial established that the defendant intentionally and deliberately violated the Act and Regulation by concealment, subterfuge, and artifice. The defendant was a wilful violator within the meaning of Section 205 (e) of the Emergency Price Control Act. The declared purposes and objectives of the Price Control Act are, in essence, to stem inflationary pressures affecting the economic structure of the nation. The courts and the Administrator are entrusted with the task of enforcing the Act and the regulations promulgated thereunder. The discretion now vested in courts under Section 205 (e) of the Act is a sound judicial discretion, not a personal discretion, controlled by established legal principles and exercised in the light of the public purposes of the statute, and which distinguishes between the intentional and nonintentional violator. In the instant case, it was reversible error for the court to divide the four-month period of violations into two parts and to refuse to assess damages for the first period, and it was an abuse of discretion to award less than treble the amount of the overcharges made during the entire period in view of defendant's flagrant and callous disregard of the Act and Regulation.

ARGUMENT

I

The evidence adduced at the trial overwhelmingly supports the findings of the Court that the defendant was a wilful violator within the purview of Section 205 (e) of the Emergency Price Control Act

"Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law" *United States* v. *City and County of San Francisco,* 310 U. S. 16, 28. "It thus appears that the transaction between defendant and Mrs. Flynn reflected by the two instruments of agreements originating as the record shows it did, in an environment of opposition and resistance by the defendant to oncoming rent control in San Francisco, is more in the nature of a contrivance to circumvent the operation of the Emergency Price Control Act in the Larkin Street apartment house than of a forthright sale of the furniture and furnishings in such property" *Taylor* v. *United States,* 142 F. 2d 808, 812 (C. C. A. 9th, 1944) cert. den. 65 S. Ct. 56.

The record here discloses that the defendant never intended to assume the economic burdens of maintaining the retail establishments; that it never intended to own and operate these establishments; that it executed the "lease" and "contract" for the purpose of evading the Regulation and in order to secure a higher price than the Regulation permitted (Findings of Fact, VI, R. 31); that the defendant never disclosed its real in-

678510—46——2

tent to the Office of Price Administration (R. 204); that it disregarded written notifications sent by the Office of Price Administration to cease its violations on two occasions (Findings of Fact, III, R. 29); that not only did it disregard the two notices, but it thereafter adopted another device to evade the Regulation (Findings of Fact, IV, R. 30); that a quietus on its contumacy was only reached when an indictment was found (R. 127); and when charges in excess of maximum ceiling prices from July 1 to November 8, 1943 had mounted to $19,149.64. Nor was the defendant a neophyte in the retail business for it operated a retail market of its own (not involved in this proceeding (R. 136).

The defendant's witnesses at the trial displayed the same stubborn opposition to the Regulation as in the evasive transactions themselves. Confronted by the testimony that the rents fixed in the "leases" were arbitrary, and by their own stipulation (R. 22) that they had never paid the rent, they asserted that it would have been purposeless since under the "employment agreement" the retailer "would then immediately owe it back." (R. 64, 157.) This untenable argument was clearly an afterthought. The retailer was bound to pay rent, as an "expense", under the dominant lease; the other rent, from defendant to retailer, was the retailer's "revenue" and defendant was bound to pay it under the purported agreement. In any event, it is clear that defendant never intended to pay rent, even under its own thesis. Unperturbed, the defendant suggested another consideration for the leases:

"Why, we furnished these markets with a very good supply of meat and give them a chance to do some business, and a chance to make some money." (R. 102.) The subterfuge in which the defendant indulged was cogently demonstrated in the following colloquy:

> Q. In other words, Mr. Joseph, there is no change in the operation of this store after July the First, than before July the first, was there, as far as you know?
>
> A. Any more than that they were supplied well with good meats. (R. 111.)

Defendant's reliance throughout the trial upon the "lease" and "agreement" glosses over its continuous concealment of the material fact that *it never intended to do what the instruments purportedly affirmed it was doing.* The defendant was a wilful, deliberate, intentional violator. Indeed, the flagrant violations accompanied by the deceptive practices were indicative of criminal intent. Compare, *United States ex rel. Brown* v. *Lederer,* 140 F. 2d 136, 138 (C. C. A. 7th, 1944) cert. den. 322 U. S. 734; *Taylor* v. *United States,* 142 F. 2d 808 (C. C. A. 9th, 1944) cert. den. 65 S. Ct. 56. *United States* v. *Steiner and Miller,* unreported (C. C. A. 7th, Dec. 18, 1945).

Defendant suggested that it had conducted itself according to the forms of law (R. 204), and produced its secretary and counsel as a witness (R. 138). "It is insisted that the proceedings were all conducted according to the forms of law. Very likely. Some of the most atrocious frauds are committed in that way. Indeed, the greater the fraud intended the more

particular the parties to it often are to proceed according to the strictest forms of law" *Graffam* v. *Burgess,* 117 U. S. 180; "And since we are in a field where subtleties of conduct may play no small part, it is appropriate to add that an order of the Board, like the injunction of a court, is not to be evaded by indirections or formal observances which in fact defy it" *National Labor Relations Board* v. *Express Publishing Co.,* 312 U. S. 426, 437; "It is true the instrument of conveyance purports to be a lease, and the sums stipulated to be paid for are rent; but this form was used to cover the real transaction, * * *" *Hervey* v. *Rhode Island Locomotive Works,* 93 U. S. 664; "The Government may look at actualities * * *" *Higgins* v. *Smith,* 308 U. S. 473, 477; "To hold otherwise would be to exalt artifice above reality and to deprive the statutory provision in question of all serious purpose" *Gregory* v. *Helvering,* 293 U. S. 465, 470. Thus, a person who in form appeared to be the agent of the defendant was held to be actually the agent of the plaintiff *Fenner & Beane* v. *Holt,* 2 F. 2d 253 (C. C. A. 5th, 1924) cert. den. 267 U. S. 605; a resolution of the board of directors of a corporation characterizing a transaction as a sale was held to be in reality a distribution of dividends, *Phelps* v. *Commissioner of Internal Revenue,* 54 F. 2d 289 (C. C. A. 7th, 1931) cert. den. 285 U. S. 558; a so-called "contract of insurance" was held to be an annuity within the purview of the Revenue Act, *Helvering* v. *Le Gierse,* 312 U. S. 531; the corporate fiction (a Bahaman corporation) was pierced in *Hay* v. *Commissioner*

of Internal Revenue, 145 F. 2d 1001 (C. C. A. 4th, 1944) cert. den. 65 S. Ct. 868; the fiction of a partnership was similarly disregarded in *Tinkoff* v. *Commissioner,* 120 F. 2d 564 (C. C. A. 7th, 1941); and a particular form of business organization will not avert a conviction under the Sherman Act if in truth there is a restraint of trade, *United States* v. *General Motors Corporation,* 121 F. 2d 376, 404 (C. C. A. 7th, 1941) cert. den. 314 U. S. 618.

The record inescapably demonstrates that the defendant deliberately concealed its fraudulent design to evade the Regulation. Fraud exists in the fullest sense of the term when a party intentionally or by design produces a false impression in order to deceive. *Shell Oil Co.* v. *State Tire & Oil Co.,* 126 F. 2d 971 (C. C. A. 6th, 1942); *United States* v. *Proctor & Gamble Co.,* 47 F. Supp. 676 (D. C. D. Mass., 1942). "In a court of conscience deliberate concealment is equivalent to deliberate falsehood. * * * Honesty of purpose prompts frankness of statement. Concealment is indicative of fraud" *Cosby* v. *Buchanan,* 90 U. S. 420.

Within the meaning of Section 205 (e) of the Price Control Act defendant's conduct was clearly wilful. Its actions were deliberate; it knew what it was doing. As such, defendant's conduct came clearly within the condemnation of the statute. *United States* v. *Illinois Central Railroad Co.,* 303 U. S. 239; *Zimberg* v. *United States,* 142 F. 2d 132 (C. C. A. 1st, 1944) cert. den. 655 S. Ct. 38; *Binkley Mining Co.* v. *Wheeler,* 133 F. 2d 863, 871 (C. C. A. 8th, 1943) cert. den. 319 U. S.

764; *Gates* v. *United States,* 122 F. 2d 571, 575 (C. C. A. 10th, 1941) cert. den. 314 U. S. 698. "* * * the transactions themselves * * * leave no doubt as to the defendant's intentions" *R. J. Koeppe & Co.* v. *Security and Exchange Commission,* 95 F. 2d 550, 553 (C. C. A. 7th, 1938); *DiMelia* v. *Bowles,* 57 F. Supp. 710, 713 (D. C. D. Mass., 1944), affirmed 148 F. 2d 725 (C. C. A. 1st, 1944); "The stipulated facts show that the shippers had knowledge of the rates published, and shipped the goods under a contention of their legal right so to do. This was all the knowledge or guilty intent that the act required" *Armour Packing Co.* v. *United States,* 209 U. S. 56.[4]

---

[4] The fact that counsel was offered as a witness does not exculpate the defendant. Counsel was not a disinterested person, for he was an officer of the defendant (R. 153), and it was not within his province to so freely grant indulgences to his client (R. 151–159). No rule of law rewards the clients of lawyers who give favorable but unfounded advice, at the expense of others in the community who are given unfavorable but reasonable opinions on the law. "If the putative taxpayer, in any case of doubt, should be permitted to fail to file a tax return, hoping this failure would never be detected, and then if detection should follow, to escape the prescribed penalty by a mere statement that taxpayer's counsel entertained a subjective belief, whether well-founded or not, that taxpayer was not subject to the tax statute in question, then any statutory penalty provision would become less than a brutum fulmen." *Fides* v. *Commissioner,* 137 F. 2d 731, 735 (C. C. A. 4th, 1943) cert. den., 320 U. S. 797.

The defendant also claimed that an employee of the plaintiff had orally approved the "lease." This assertion was contrary to the facts (R. 162, 180), and the court below so held (R. 204). Compare, *Bowles* v. *Sisk,* 144 F. 2d 163, 165 (C. C. A. 4th, 1944); *Utah Power & Light Co.* v. *United States,* 243 U. S. 389; *Great Northern Co-op. Ass'n* v. *Bowles,* 146 F. 2d 269 (Em. Ct. of App., 1944).

II

"Discretion" within the meaning of Section 205 (e) of the Emergency Price Control Act is a sound judicial discretion exercised in the light of the public purposes of the statute, and with due regard to the wilfulness or nonwilfulness of the violator

(a) "Discretion" within the purview of Section 205 (e) of the Emergency Price Control Act, as amended, connotes the exercise of a sound judicial discretion whose "testing area must be regarded as being coextensive only with a sound furtherance or protection of the public rights or interest involved" *United States* v. *1,997.66 Acres of Land,* 137 F. 2d 8, 14 (C. C. A. 8th, 1943). "It is the wish of the law and not the will of the judge toward which judicial discretion must always seek to be directed" *United States* v. *1,997.66 Acres of Land, supra,* p. 14. The discretion "must be exercised in the light of the large objectives of the Act. For the standards of the public interest not the requirement of private litigation measure the propriety and need * * *" *Hecht* v. *Bowles,* 321 U. S. 321, 331. Congress and the courts are in common agreement on the purposes and objectives of the Price Control Act. The declared objectives and purposes of the Act, among other things, are to stabilize prices; to protect persons from undue impairment of their standard of living, and institutions from hardships which would result from abnormal increases in prices; to prevent a post emergency collapse of values; and to stabilize agricultural prices. Emergency Price Control Act, Section 1 (a)

(50 U. S. Code App., Section 901). "If we fail on this sector of the domestic front, whatever our success in the field, on the sea, or in the air, victory will be bitter. For of all the consequences of war, except human slaughter, inflation is the most destructive" Senate Report, No. 931, 77th Congress, 2d Session, p. 2; "Congress in Section 1 (a) of the Act has made clear its policy of waging war on inflation" *Bowles* v. *Willingham,* 321 U. S. 503, 514.

The reconversion period raises the problem more acutely. "The fact that the Nation must, without pausing in its stride toward victory, begin now to reconvert its industrial machine to peacetime purposes is no reason to relax our vigilance. We are forewarned by experience. Inflationary pressures today are many times those which World War I produced" Senate Report, No. 325, Part I, 79th Congress, 1st Session (1945) p. 2; to weaken price control "would be to weaken our guard against the disasaters which, unless we are firm in our resolution, inflation can and will yet cause", *Supra,* p. 4.

(b) The administrative needs of the Price Administrator, upon whom the task of enforcing the Act has been imposed, has enlisted the sympathetic aid of the courts. "The Administrator does not carry the sole burden of the war against inflation. The courts also have been entrusted with a share of that responsibility" *Hecht* v. *Bowles,* 321 U. S. 321, 331; "Court and agency are the means adopted to attain the prescribed end, and so far as their duties are defined by the words of the statute, those words should

be construed so as to attain that end through coordinated action." *Hecht* v. *Bowles, supra,* 330. "Any easy attitude of the courts which even remotely suggests that the Act may be violated with impunity strikes at the entire enforcement problem." *Bowles* v. *Montgomery-Ward & Co.,* 143 F. 2d 38, 43 (C. C. A. 7th, 1944); "* * * courts must not forget that they, in coordination with the administrative agency, have a public duty commensurate with the congressional policy and one which they may not escape without abdicating in favor of some other tribunal more responsive to the public needs" *Bowles* v. *Nu-Way Laundry Co.,* 144 F. 2d 741, 746 (C. C. A. 10th, 1944) cert. den. 65 S. Ct. 431.

The treble damage sanction is an essential ingredient of the enforcement program. "Price control which cannot be made effective is at least as bad as no price control at all. * * * Such actions (treble damage suits) have proved valuable in the enforcement of other regulatory statutes, such as the Fair Labor Standards Act, both to relieve the Government of a part of the burden of enforcement and to deter initial violations" Senate Report, No. 931, 77th Congress, 2d Session, pp. 8, 9; "This action is the peoples' remedy against inflation. It was written into the statute because the Congress recognized the practical need of this aid to enforcement" Senate Report, No. 922, 78th Congress, 2d Session, p. 14; "In allowing treble damages to an aggrieved litigant, Congress adopted a technique (familiar to us through the Anti-Trust Acts and the Fair Labor Standards

Act) which not only makes the aggrieved person whole, but also gives an interested person a reward for acting as an agent of law enforcement, deters potential violators by a threat of heavy damages and punishes actual violators by the imposition of substantial judgments." *Gilbert* v. *Thierry,* 58 F. Supp. 235, 240 (D. C. D. Mass., 1944), affirmed 147 F. 2d 603 (C. C. A. 1st, 1945).

(c) In *Bowles* v. *Krodel,* 149 F. 2d 398 (C. C. A. 7th, 1945) and *Bowles* v. *Goebel,* unreported (C. C. A. 8th, 1945), the courts declined to follow the suggestion of the Administrator that a judgment for treble the amount of the charges was mandatory under Section 205 (e), as amended, where the defendant offered no testimony to bring himself within the proviso of the statute or failed to establish lack of wilfulness. In the *Krodel* case, the majority of the court held that the lower court may hear evidence relative to the circumstances of the violation "for the purpose of properly exercising its discretion", *supra,* p. 401, but did not rule on whether the lower court had properly exercised its discretion because the Administrator had not raised the question on appeal. In his dissenting opinion, Mr. Justice Kerner declared that the statute vested in the District Court a sound judicial discretion as opposed to unlimited discretion; that it was an abuse of discretion not to require the defendant to pay three times the amount of the overcharges when the record disclosed that the defendant had deliberately tried to evade the regulation establishing the maximum price. "If the public interest is to be pro-

tected and the statute is to have its full and proper deterring effect on prospective wrongdoers, defendant must be penalized", *supra,* p. 401. Probably on this issue there was no conflict between the majority of the court and the minority.

In the *Goebel* case, the court too stated:

> In nothing that we have said, however, is there any implication of course that the court in exercising discretion on whether multiple damages should be assessed or what their amount ought to be has the right or power to act arbitrarily or without sense of official responsibility, or that the broad propriety of its action in a particular case is not subject to being tested on appeal against abuse. Discretion in a legal sense necessarily is the responsible exercise of official conscience on all the facts of a particular situation in the light of the purpose for which the power exists. It should hardly be necessary to suggest, for instance, that a mere assessment of single damages for a plainly flagrant defiance of a price regulation would not ordinarily constitute a proper exercise of the power of discretion under the public purpose of the Emergency Price Control Act. As the Supreme Court pointed out in the *Hecht Co.* case, *supra,* 321 U. S. at page 331, 64 S. Ct. at page 592, in relation to the discretion of the courts to grant or deny an injunction under the Act, "their discretion * * * must be exercised in light of the large objectives of the Act. * * * That discretion should reflect an acute awareness of the Congressionl admonition that 'of

> all the consequences of war, except human slaughter, inflation is the most destructive'."
> * * *

It appears clear, therefore, that the discretion of the court under Section 205 (e) of the Act, as amended, must be exercised in the light of the objectives of the Act and must be measured by the standards of the public interest in avoiding inflation and not by the requirements of private litigation.

(d) Congress has itself afforded an additional guide for the appropriate exercise of discretion by the courts. The statute reads, in part:

> Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was *neither wilful* nor the result of *failure to take practicable precautions* against the occurrence of the violation. [Italics added.]

Wilfulness denotes that which is intentional, or knowing, or voluntary, (*Zimberg* v. *United States,* 142 F. 2d 132, 137 (C. C. A. 1st, 1944)), as distinguished from accidental or negligent violation (*Bowles* v. *870 Seventh Avenue Corp.,* 150 F. 2d 819 (C. C. A. 2d, 1945)). Only where the defendant has proved lack of wilfulness and the exercise of practicable precautions is the court deprived of discretion. But if the proviso be not established, or invoked, then it would appear clear that Congress intended the courts in the exercise of a sound judicial discretion to distinguish between the person who negligently or carelessly, but honestly,

endeavors to comply with the law and the contumacy of one who dishonestly violates it.[5]

III

Where the evidence clearly established that the defendant wilfully violated the regulation by deception and subterfuge it was reversible error for the court to refuse to assess damages for a part of the period when the violations occured, and an abuse of discretion to award less than treble the amount of overcharges for the entire period

A critical examination of the evidence adduced at the trial and the District Court's findings of fact and

[5] The Congressional debates lend additional support to the view that "discretion" within the purview of Section 205 (e) of the Act means a sound judicial discretion, the proper exercise of which distinguishes between the intentional and unintentional violator. Indeed, to place the wilful and nonwilful violator upon a parity would appear to subvert Congressional intent. "It is not my intention to protect anyone who wilfully violates the law, * * *. If he cannot prove that he did not wilfully commit the act, he is stuck, and I will not make a plea for him * * *. I am only seeking to preserve a * * * right to show that he was not wilful * * *." (Chandler, 5381, 5382.) (References are to the Congressional Record, Vol. 90, perm. ed.); "when he has not done anything wilfully wrong, when such conditions exist the courts shall have the right to listen to him * * *." (Hawkes, 5441); "* * * unless the proposed amendment is adopted there will be put upon a parity those who wilfully violate the law and those who unintentionally violate it." (Revercomb, 5444); "I am very happy to be advised of the Hecht case * * *. Let the Congress * * * follow the holding of the Supreme Court * * *." (Revercomb, 5445); "* * * to protect those who are innocent, and who might inadvertently or unintentionally violate some rule or regulation." (Hatch, 5447); "If he does it deliberately, I think the O. P. A. is right. If, on the other hand, he does it through oversight or does it to a very minor extent, * * *." (Wright, 5885); "The amendment leaves this bill thoroughly effective against the dishonest merchant and the chiseler, but protects the honest merchant from being penalized for an honest mistake." (Goodwin, 5886.)

conclusions of law, viewed in the light of the expressed public policy of the Act, leads to the conclusion that the court erred in failing to grant plaintiff treble the amount of overcharges. As we have shown, the trial court is vested with a sound judicial discretion, not a personal discretion. There is no exercise of a sound judicial discretion where the court's action is based upon an erroneous conception of the law or the relevant facts. *Ring* v. *Spira,* 148 F. 2d 647, 650 (C. C. A. 2nd, 1945); *Bowles* v. *Nu-Way Laundry Co.,* 144 F. 2d 741 (C. C. A. 10th, 1944); *Bowles* v. *Meyers,* 149 F. 2d 440 (C. C. A. 4th, 1945); *Bowles* v. *Sanden & Ferguson Co.,* 149 F. 2d 320 (C. C. A. 9th, 1945); *Bowles* v. *Simon,* 145 F. 2d 334 (C. C. A. 7th, 1944); "Moreover, legal discretion in such a case does not extend to a refusal to apply well-settled principles of law to a conceded state of facts," *Union Tool Co.* v. *Wilson,* 259 U. S. 107.

The violations here occurred between July 1, 1943, and November 8, 1943. Here is the manner in which the court assessed the damages: (1) July 1 to July 31—no assessment of damages (solely restore overcharges); (2) August 1–August 31—no assessment of damages (solely restore overcharges); (3) September 1–September 15—no assessment of damages (solely restore overcharges); (4) September 16–November 8—1½ times the overcharges made during that period (R. 200–202, 207–210).

While it is customary to treat the return of overcharges as "damages," it may at the outset be observed that the term is inappropriate, for the malefactor can hardly be "damaged" if he is required to

return the loot. The exercise of a sound judicial discretion would require a consideration of the fact that a mere restoration of the overcharges will encourage, rather than deter, violations, especially when the violation is plainly willful. In the instant case, for example, the defendant who deliberately flouted the Regulation has only been required to return the overcharges made during the first half of the period when the violations occurred. The defendant thus has been treated in precisely the same fashion as one who was nonwillful and took every practicable precaution to avoid the occurrence of the violation. Moreover, although the Court in its discretion could have imposed statutory damages of $38,299,28 (in addition to the overcharges), the actual amount assessed by the Court in addition to the overcharges was $2,577.25. Under the circumstances revealed in the record, where the defendant here willfully concealed the material and qualifying facts that it had no intention of becoming the owner and operator of the retail markets (R. 198), that it had no intention of assuming the economic burdens of the retailers, it was error for the trial court (in the light of its own findings) to create a dichotomy in the four-month period of violations and award less than the treble damages demanded in the complaint. The court's discretion was exercised upon the basis of personal factors which overlooked the facts and misapprehended the law.

1. July 1–July 31

The trial court stated that "there was neither a willful violation nor was such violation the result of

failure to take practical precautions against the occurrence of a violation during the month of July. The defendant through its president and manager, and through its counsel, sought to work out some plan whereby they would not violate the law, and yet be able to carry on their meat-processing business at a rate and to a degree sufficient to insure its survival" (R. 200). The difficulty with the court's position is that the evidence established (and the court so found R. 30, 31) that the *defendant worked out a plan to violate* the law. The "practicable precautions" which the defendant took was *to avoid detection,* not to avoid violations. Congress intended the words "practicable precautions" to encompass solely the forthright efforts of a prodent man to comply with the Act; not the efforts of a violator intent on evasion. It is clear that the proviso contained in Section 205 (e) of the Act was unavailing to defendant. Any other ruling would be completely inconsistent with the court's findings of fact and conclusions of law, and run counter to the plain language of the statute and the decisions which have interpreted it. Nor was the court entitled to consider the hardship which the Regulation allegedly inflicted on the defendant. Those are matters which are committed to the exclusive jurisdiction of the Emergency Court of Appeals (Section 204). *Bowles* v. *Willingham,* 321 U. S. 503; *Yakus* v. *United States,* 321 U. S. 414; *Bowles* v. *Nu-Way Laundry Co.,* 144 F. 2d 741 (C. C. A. 10th, 1944); *Bowles* v. *American Brewery, Inc.,* 146 F. 2d 842 (C. C. A. 4th, 1945); *Bowles* v. *Bayview Manor Homes,* 145 F. 2d 618 (C. C. A. 4th, 1944); *Bowles* v. *Hurvitz,* 58 F. Supp. (D. C. W. D. N. Y., 1944).

"* * * it is not competent for the court to consider the fairness or the equity of any regulation or price schedule established thereby * * *. If the hardships recognized by the trial court as constituting the basis for a denial of the injunction are disproportionate to the common burden of a wartime economy the remedy is adequately provided elsewhere in the Act, Section 203 (a) and 204 (a) (b) (c) (d) and not in the trial Court" *Bowles* v. *Nu-Way Laundry Co., supra,* 746, 748.

2. August 1–August 31

The court stated: "It is evident that upon the receipt of that letter (Pltf's Ex. 1, R. 122) there was some condition about Mr. Joseph's health, or something of that nature, * * * that caused him to take no immediate action. That would be no excuse whatever in a matter of so vital importance as this is; however the O.P.A. took no action, but by August 30th there was again a letter (Def'dt's Ex. A–3, R. 87) from them to the defendant * * * *which again clearly indicates * * * that the conduct of the business under this arrangement would be looked upon and taken as an evasion and a violation,* and while there is some language by the writer of that letter that there might be further conferences, that is not sufficiently persuasive for me in the exercise of discretion to say it meant that the same practices should continue thereafter indefinitely, however because of the writing of that letter and the negotiations which had taken place wherein the defendant was seeking to take reasonable precautions to avoid becoming subject to damages and penalties, cause me to hold that for the

month of August, likewise, they should be liable for the amount of the overcharges." (R. 201.)

Letters sent by employees of a governmental agency to a defendant advising it that its conduct constitutes a violation of the Act and Regulation, requesting cessation of such conduct, and inviting defendant to confer with the office, do not cloak the defendant's conduct with legality nor lessen the wilfulness of the offense. Compare, *Utah Power & Light Co.* v. *United States,* 243 U. S. 389. The "negotiations" to which the court refers were the artifices in which defendant indulged while concealing its real illegal intent—and, we again assert, the court so found (Findings of Fact V, VI, R. 30, 31; R. 195, 197, 198, 204, 205).

3. September 1–September 15

Failure on the part of the court to distinguish between the exercise of a personal discretion and a sound judicial discretion enabled the defendant to bargain for another two weeks' absolution (R. 207–210); this, because the letter of August 30th from the Office of Price Administration to the defendant (Def'dt's Ex. A–3, R. 87) calling for a cessation of violations contained the following sentence: "A reasonable time will be allowed to effectuate a termination before we proceed with legal action." (R. 209.) Since the defendant never ceased its violations (until November 8, and the indictment), no apparent reason exists for an exercise of discretion in its favor. A reasonable time to terminate the devices used to further illegal conduct does not render the conduct legal nor constitute a release of the Administrator's claim for treble damages.

"A holding in favor of the defendant here would be tantamount to a holding that the Act and Regulation need not be complied with until action is brought, and that escape without consequence may be had by then submitting to the law" *Bowles* v. *East Penn Weaving Co.,* 57 F. Supp. 127, 128 (D. C. E. D. Pa., 1944).

4. September 16–November 8

No reason was advanced by the court for the grant of only 1½ times the overcharges made during this period. The damages were granted because the court found that "the violations were knowingly made, and were the result of a failure to take practicable precautions." (R. 202.)

It is submitted that the court committed reversible error in differentiating between the period from July 1 to September 15, and the period from September 15 to November 8. Because the gravamen of the defendant's offense was the subterfuge in which it indulged (and not the forms it used to conceal that subterfuge), the distinction drawn by the court was "illusory", *Taylor* v. *United States,* 142 F. 2d 808, 813 (C. C. A. 9th, 1944) and "baseless", *United States* v. *C. I. T. Corporation,* 93 F. 2d 469, 471 (C. C. A. 2nd, 1937).

The defendant was a wilful violator who flagrantly disregarded the terms of the Act and Regulation by evasion and subterfuge; whose scheme was engendered in "an environment of opposition and resistance" to the Act and carried out through resort to artifices intended to conceal the fraud-

ulent plan. Under circumstances such as these, the courts have held it to be an abuse of discretion to deny the injunctive sanction provided in the Act. *Bowles* v. *Nu-Way Laundry Co.,* 144 F. 2d 741 (C. C. A. 10th, 1944); *Bowles* v. *Sanden & Ferguson,* 149 F. 2d 320 (C. C. A. 9th, 1945); *Bowles* v. *Simon,* 145 F. 2d 334 (C. C. A. 7th, 1944); *Lenroot* v. *Interstate Bakeries Corp.,* 146 F. 2d 325 (C. C. A. 8th, 1945); *Bowles* v. *Meyers,* 149 F. 2d 440 (C. C. A. 4th, 1945), and have upheld resort to the criminal sanction. *Taylor* v. *United States,* 142 F. 2d 808 (C. C. A. 9th, 1944); *United States ex rel. Brown* v. *Lederer,* 140 F. 2d 136 (C. C. A. 7th, 1944); *United States* v. *Steiner and Miller,* unreported (C. C. A. 7th, Dec. 18, 1945). It is submitted that the rule is equally applicable to the sanction of the treble damage suit. The exercise of a sound judicial discretion, to accomplish the declared objectives of the Act, requires not only that a distinction be drawn between wilful and non-wilful violators, but that treble damages be assessed against those who intentionally and deliberately violate the Act in complefe disregard of its terms, especially when, as in the instant case, the violations occur through the concealment of material facts. Congress, by its amendment to Section 205 (e), did not intend any additional benefit to this defendant.

CONCLUSION

The judgment in so far as appealed from should be vacated with directions to enter judgment in a sum treble the amount of the overcharges, as demanded in the complaint.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
MILTON KLEIN,
Director, Litigation Division,
DAVID LONDON,
Chief, Appellate Branch,
SAMUEL ROSENWEIN,
Attorney,
Office of Price Administration, Washington 25, D. C.
HERBERT BENT,
Regional Litigation Attorney.
San Francisco, California.

APPENDIX

Statement of Considerations Accompanying Amendment to Section 1364.406 of Maximum Price Regulation 169 (August 16, 1943)

"The accompanying amendment prohibits the creation of any device or arrangement whereby a slaughterer or wholesaler delivers beef or veal to a retail establishment and receives for the meat a greater realization than he would be entitled to receive if he sold the meat to that establishment under this regulation. The prohibition does not apply to the ownership and operation of a retail store by a slaughterer or wholesaler. This action is necessitated by recent developments which threaten the complete destruction of the wholesale ceilings, a sharply inflationary rise in the price of meat, serious maldistribution, and the independence of meat retailers. The fundamental cause of these developments is the serious shortage of beef relative to the supply available for civilian consumption.

"Retailers are desperately eager to secure beef for their customers. Business can continue for a time on an inadequate margin; it cannot exist at all without meat to sell, and beef is the preferred meat. Retailers have consequently been willing to acquiesce in arrangements which have the effect of giving to the packer part of the retail operating margin established by the spread between the wholesale and retail ceilings. The arrangements proposed, and in some cases put into operation, vary in detail and in the legal form which they adopt. They have in common one fundamental characteristic: the slaughterer receives a greater amount for his meat than he could lawfully charge

under the regulation, and the retailer continues to operate and maintain his business establishment. By retaining title to the meat until it is sold to the consumer, the slaughterer nominally accepts the risk of not being able to sell the meat to consumers. But under present conditions there is actually no risk of being unable to sell beef to consumers. The return of current operating expenses is assured by the delivery to the retail establishment of a sufficient quantity of beef. And a short-term cancellation clause usually protects the slaughterer from incurring any substantial expense in connection with the maintenance of the retail establishment.

"Continuation of this tread will enable the participating slaughterers to pay a higher price for cattle than the wholesale ceiling prices for beef will support. Stabilization of cattle prices will become impossible. The prices for the sale of beef to the war agencies will have to be increased, further inflating cattle prices. Packers unable to acquire the use of retail outlets—including the four largest, who are precluded by consent decree—will have to be granted an increase in ceiling prices for the sale of beef in the civilian market. Retail margins will thereby be contracted to a point which will fail to return the costs of retail operations, and a rise in retail meat prices will become inevitable. The effort to control the price level on an important cost of living commodity will fail, with catastrophic results for the entire stabilization program.

"Even if direct controls on cattle prices were in effect, the by-passing of the wholesale ceilings would have disruptive effects on the distribution of meat. The paramount demand for beef would enable slaughterers to exact an unduly high price for retailers. Beef would tend to move only to those retailers willing

to participate in such a scheme, preventing an equitable distribution of the available supply. The resulting pressure would make extremely difficult the enforcement of dollar and cents retail ceilings, and threaten the actual level of retail beef prices.

"Most of the devices which have come to the attention of the Price Administrator are already illegal because they clearly evade the price limitation of the regulation. The accompanying amendment does no more than make specific a principle already implicit in the regulation. An explicit prohibition is deemed desirable to avoid dispute as to the application of the principle to various plans differing in detail and in legal form, and to emphasize the critical nature of the issue involved.

"The prohibition does not extend to cases where the slaughterer purchases unconditionally a retail establishment and operates that establishment for the sale of meat slaughtered by him. Such an arrangement cannot be regarded as an evasion of the regulation. The slaughterer assumes the full economic burden of maintaining the retail establishment. Only so long as he discharges that burden in full can he realize the benefits sought. And he assumes the risk of loss should the maintenance of the establishment for any reason become undesirable. The magnitude of the economic risk involved is a sufficient guarantee that the expedient will not be adopted to such an extent as to bring about the consequences previously explained. Moreover, there is precedent in the industry for this type of transaction, precedent which is wholly lacking for the evasive devices which the accompanying amendment expressly prohibits.

"In §§ 1364.405 (d) and 1364.407 (e) (2), the dates July 20, 1943, and July 26, 1943, are changed to August 20, 1943, and August 14, 1943, respectively."

U. S. GOVERNMENT PRINTING OFFICE: 1946

No. 11089

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHESTER BOWLES, Administrator, Office of Price Administration, *Appellant*,

vs.

JAMES HENRY PACKING COMPANY, a Corporation, *Appellee*.

JAMES HENRY PACKING COMPANY, a Corporation, *Cross-Appellant*,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration, *Cross-Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

BRIEF OF JAMES HENRY PACKING COMPANY
Appellee and Cross-Appellant

ALMON RAY SMITH
800 Northern Life Tower
Seattle 1, Washington

HENRY CLAY AGNEW
1103 Smith Tower
Seattle 1, Washington
Attorneys for Appellee and Cross-Appellant.

THE ARGUS PRESS, SEATTLE

No. 11089

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHESTER BOWLES, Administrator, Office of Price Administration, *Appellant*,

vs.

JAMES HENRY PACKING COMPANY, a Corporation, *Appellee.*

JAMES HENRY PACKING COMPANY, a Corporation, *Cross-Appellant*,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration, *Cross-Appellee.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

BRIEF OF JAMES HENRY PACKING COMPANY
Appellee and Cross-Appellant

ALMON RAY SMITH
800 Northern Life Tower
Seattle 1, Washington

HENRY CLAY AGNEW
1103 Smith Tower
Seattle 1, Washington
Attorneys for Appellee and Cross-Appellant.

THE ARGUS PRESS, SEATTLE

SUBJECT INDEX

TABLE OF CASES

STATUTES

EXECUTIVE ORDERS

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHESTER BOWLES, Administrator, Office of Price Administration, *Appellant*, vs. JAMES HENRY PACKING COMPANY, a Corporation, *Appellee*.	No. 11089
JAMES HENRY PACKING COMPANY, a Corporation, *Cross-Appellant*, vs. CHESTER BOWLES, Administrator, Office of Price Administration, *Cross-Appellee*.	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

BRIEF OF JAMES HENRY PACKING COMPANY

Appellee and Cross-Appellant

STATEMENT OF PLEADINGS
And
FACTS DISCLOSING JURISDICTION

For convenience, James Henry Packing Company, defendant in the District Court, and appellee and cross-appellant herein, will hereafter be referred to as the cross-appellant.

On February 29, 1944, Chester Bowles, Administrator of the Office of Price Administration, on behalf of

The United States of America, commenced an action in the District Court of The United States for the Western District of Washington, Northern Division, against the cross-appellant under the provisions of Section 205(e) of the Emergency Price Control Act of 1942, alleging a violation by the cross-appellant of Maximum Price Regulation No. 169 as amended, relating to beef and veal, by an overcharge to purchasers at wholesale of carcasses and cuts of beef and veal to the amount of $19,149.64, asking judgment for treble the amount of the alleged overcharge (Tr. 2). Issue was joined (Tr. 11), and on January 19, 1945, judgment was awarded against the cross-appellant in the sum of $21,826.89 (Tr. 35).

Jurisdiction was conferred on the District Court by Sections 205(c) and 205(e) of the Emergency Price Control Act of 1942 (56 Stat. 23—Title 50 U.S. C.A. App. 904(a)). During the pendency of the action in the District Court, said Section 205(e) was amended by Section 108(b) of the Stabilization Extension Act of 1944 (58 Stat. 632—Title 50 U.S.C.A. App. 901). By Subsection (d) the amendment was made applicable to pending proceedings.

Jurisdiction of the Circuit Court of Appeals to review the judgment on appeal is found in Section 128 of the Judicial Code as amended (43 Stat. 936—Title 28 U.S.C.A. App. 225(a)).

STATEMENT OF THE CASE

Cross-appellant is, and during the year 1943 and prior thereto was, a meat packing company in Seattle, Washington, with approximately 100 employees (Tr. 13 and 74). During the month of July 1943, and for sometime prior thereto, there was a scarcity of processed meats and meat products in and around Seattle, and many retail meat markets suspended business (Tr. 14). During the year 1943 maximum prices on carcasses and wholesale cuts of beef and veal were fixed by regulations of the Office of Price Administration (Tr. 2), but no price ceilings were established on livestock (Tr. 148). It was not possible to buy livestock on the market and process it except at a loss (Tr. 86).

Among the operators of retail markets in Seattle who were customers of cross-appellant were the 25 individuals called lessors in Exhibit 'A' attached to the complaint, who, because of their inability to secure meat and meat products, requested cross-appellant to take over their markets (Tr. 114). Sixteen of the 25 markets involved also handled groceries in the same premises (Tr. 132). Eight of said lessors owned the premises in which their markets were located, and the remainder were lessees (Tr. 21).

Between July first and July 22, 1943, inclusive, the 25 individuals named in Exhibit 'A' of the complaint executed one-year leases of their meat markets to cross-appellant, and each lessor, at the time of executing the lease, entered into a contract with cross-appellant to operate and manage the respective markets for cross-appellant (Tr. 15). The same form of lease and

the same form of contract of employment were used in all cases.

The rentals reserved in the leases were the reasonable rental values of the markets (Tr. 134). The compensation of the managers was a percentage of gross receipts (Tr. 20). Following the execution of the leases and contracts of employment, cross-appellant, in writing, instructed each of its managers to carefully observe price ceilings in making purchases and sales and also to comply with the rules and regulations of the Economic Stabilization Director with reference to wages and salaries paid employees (Exhibit A-1; Tr. 76).

Cross-appellant also furnished each manager with a printed form on which to report daily sales (Defendant's Exhibit A-2; Tr. 79), and ordered signs four feet long and eighteen inches wide, bearing the words "James Henry Market No. .....," to be installed on the front of each market (Tr. 79).

Following the execution of the lease and the contract, cross-appellant delivered to the respective markets beef, lamb and pork in wholesale cuts, and ham, bacon and lard (Tr. 14), and rendered invoices similar in form to those used prior to the leasing, but identical to the form used in billing merchandise to a retail market on Western Avenue which was owned outright by cross-appellant (Tr. 129).

A form of lease and a form of contract of employment had been drafted by counsel for cross-appellant prior to July 1, 1943, and were submitted to the local office of the Office of Price Administration, and criti-

cized because of a cancellation provision upon thirty days' notice (Tr. 139).

The documents were redrafted, eliminating the cancellation clause, and again submitted to the local office of the Office of Price Administration. The 25 leases and contracts involved were then negotiated.

On July 30th the District Price Attorney of the local Office of Price Administration wrote cross-appellant a letter stating that, in the opinion of the local office, the leasing arrangements were forbidden evasions of Revised Maximum Regulation 169, and that he would be glad to discuss the matter further at the convenience of cross-appellant (Plaintiff's Exhibit 1; Tr. 122).

A copy of the letter, Plaintiff's Exhibit 1, was mailed to the attorney for cross-appellant, who promptly answered, informing the Chief Attorney of the local Office of Price Administration that Mr. Joseph, the President and Manager of the cross-appellant, was in Canada on vacation, and that "as soon as he returns, we will get in touch with your office for the suggested conference" (Defendant's Exhibit A-9; Tr. 146).

Upon his return from Canada, Mr. Joseph was at his home, ill, for two or three weeks (Tr. 121), and no other officer of cross-appellant was familiar with the matter (Tr. 153). On August 23d counsel for cross-appellant wrote the Chief Attorney that he had just secured a copy of the clarifying amendment referred to in the letter of July 30th (Plaintiff's Exhibit 1), which required retail markets to be wholly owned by the processor supplying the meat, expressing his

opinion that the leased markets were wholly owned by cross-appellant and asking for an interpretation of the amendment. The letter also states: "If the Price Administrator should take the position that the leases are an evasion, then we must, of course, request our lessors to agree to a mutual cancellation" (Defendant's Exhibit A-10; Tr. 147).

One week later, August 30th, the Litigation Attorney of the local Office of Price Administration wrote cross-appellant that, in his view, the leases and contracts constituted an evasion of the price ceiling regulation and concluded with the following paragraph: "A reasonable time will be allowed to effectuate termination before we proceed with legal action. We shall expect, however, to be kept advised of the progress in bringing about rescissions."

This letter from the Litigation Attorney was promptly acknowledged by cross-appellant (Defendant's Exhibit A-4; Tr. 89), stating that the letter was being referred to legal counsel requesting advice and instructions on how to proceed to accomplish cancellation of the leases and contracts.

Cross-appellant handled no veal (Tr. 59). Beef constituted 57% of all meats delivered to the markets, and no records were kept by the markets of the percentage of beef to total sales at retail, but it was estimated and agreed by and between the market managers and cross-appellant that beef sales at retail approximated 30% of total sales except in two instances, where the percentage was slightly more (Tr. 21).

On September 24th cross-appellant wrote each of

its managers a letter (Defendant's Exhibit A-5; Tr. 91) advising them that, in the opinion of the local attorneys for the Office of Price Administration, the contracts of employment were an evasion of Price Regulation 169 as amended, and that it would thereafter relinquish to the managers all interest in receipts from sales of beef and veal furnished by cross-appellant. A copy of this letter to managers was sent to the Litigation Attorney of the Office of Price Administration with the information that cross-appellant would protest the interpretation of the regulation by the local office and appeal therefrom.

On October 4th the Litigation Attorney wrote cross-appellant a letter, reading:

> "With reference to your letter of September 24th transmitting to us a copy of a form letter addressed to persons operating retail outlets under your direction, will you be good enough to inform us whether the deductions from the sales of meat products other than beef and veal mentioned in your form letter are still being made by these markets." (Defendant's Exhibit A-6; Tr. 94)

On October 11th cross-appellant answered the letter of the Litigation Attorney, advising him that no change had been made in the leases other than to comply with his interpretation of the price regulation as expressed in his letter of August 30th (Defendant's Exhibit A-7; Tr. 96).

On November second, cross-appellant wrote each of its market managers that the Office of Price Administration viewed the leases and contracts as not sanctioned by Government price regulations, and re-

quested that they agree to a mutual cancellation as of November first (Defendant's Exhibit A-8; Tr. 98).

This letter followed a conference with the officials of the Office of Price Administration, at which it was apparent that they would not approve the leases and contracts, notwithstanding the deductions of beef sales (Tr. 151).

Although none of the lessors had yet agreed to a cancellation, cross-appellant treated the leases and contracts as cancelled as of November 1, 1943 (Tr. 16). After securing from cross-appellant a detailed statement of net receipts from the operation of the markets (Tr. 5, 6, 7, 8, 9 and 10), and three months after cross-appellant ceased operating the markets, the Office of Price Administration filed this suit upon the theory that deliveries of beef to said markets were, in fact, sales to the market managers, and that such net receipts were, therefore, overcharges and an evasion of Price Regulation 169 (Tr. 2).

SPECIFICATION OF ERRORS

I.

The District Court erred in its Finding of Fact IV. that cross-appellant failed and neglected to take any steps to terminate said leases and contracts until September 23, 1943.

II.

The District Court erred in its Finding of Fact IV. that cross-appellant collected $19,149.64 in excess of selling price.

III.

The District Court erred in its Finding of Fact IV. that said leases and contracts were mutually cancelled by the parties thereto.

IV.

The District Court erred in its Finding of Fact V. that cross-appellant did not pay any retail sales tax on sales made by said stores, nor file any return of sales tax or business tax due the State of Washington from said stores.

V.

The District Court erred in its Finding of Fact V. that the amount of monthly rental fixed in the leases was an arbitrary sum.

VI.

The District Court erred in its Findings of Fact V. that cross-appellant never gave instructions to said markets as to management or books and records of account to be kept, and never authorized any of the obligations incurred by said markets.

VII.

The District Court erred in its Finding of Fact V.

that the operation, management and control of said markets continued in every way without change after the execution of said leases or contracts, except that said markets were required to pay cross-appellant a percentage of their gross sales in addition to the payment of ceiling prices.

VIII.

The District Court erred in its Finding of Fact VI. that said leases and contracts were and are evasions of Maximum Price Regulation 169.

IX.

The District Court erred in its Finding of Fact VII. that the gross sales of said stores in 1942 exceeded $500,000.00.

X.

The District Court erred in its Finding of Fact VIII. that cross-appellant received any excess over ceiling prices fixed by Maximum Price Regulation 169.

XI.

The District Court erred in its Findings of Fact VIII. that up to September 15, 1943, was a reasonable time allowed cross-appellant to cancel said leases and contracts.

XII.

The District Court erred in its Finding of Fact VIII. that failure to cancel said leases and contracts by September 15, 1943, was an unreasonable delay, and that collections in excess of Maximum Price Regulation 169 were done knowingly by cross-appellant and the result of its failure to take practicable precautions against the occurrence of a violation of said Price Regulation.

XIII.

The District Court erred in its Finding of Fact IX. that cross-appellant should be required to pay the Administrator on behalf of The United States the total sum of $21,726.89 and costs of suit.

XIV.

The District Court erred in making its Conclusion of Law I., that the leases and contracts referred to in the Findings were made for the purpose of securing a higher price for beef than permitted by Price Regulation 169 and were and are forbidden evasions of said Regulations.

XV.

The District Court erred in its Conclusion of Law I., that cross-appellant's failure to cancel said leases and contracts by September 15, 1943, was an unreasonable delay, and that Maximum Price Regulation 169 was knowingly evaded by cross-appellant, and that cross-appellant failed to take practicable precautions against the occurrence of Maximum Price Regulation 169.

XVI.

The District Court erred in its Conclusion of Law II., that the Administrator was entitled to judgment against the cross-appellant.

XVII.

The District Court erred in its Conclusion of Law II., in awarding judgment for the total receipts of cross-appellant from the operation of said markets, when only 57% of the meats delivered to said markets was beef.

XVIII.

The District Court erred in its Conclusion of Law II., in awarding judgment for one and one-half times the receipts from said markets for the period beginning September 15th and ending November 8, 1943.

Cross-appellant relies upon each and every Specification of Error, as each specification is germane to the issues. The Specifications of Error raise two principal question:

First:Were there any *sales* of beef at wholesale upon which said Emergency Price Control Act and Price Regulation 169 could operate?

Second:If the operation of the retail markets by cross-appellant was a violation of the law and the regulation, was such violation wilful or the result of failure of cross-appellant to take practicable precautions against the occurrence of the violations?

SUMMARY OF ARGUMENT

1. Cross-appellant did not fail and neglect to take steps to terminate the leases and contracts until September 24, 1943, as found by the Trial Court, but at all times expressed its willingness and intent to secure a mutual resicission if it should be determined that the leases and contracts were forbidden.

2. Cross-appellant collected no money in excess of wholesale ceiling prices, as it sold no beef at wholesale.

3. The leases and contracts were legal and binding upon the parties and could not be cancelled by cross-appellant, but required the mutual consent of the parties.

4. Contrary to the Finding of the Trial Court, each market paid all sales tax and all business taxes due the State of Washington.

5. The monthly rental reserved in the leases was the rental value of the leased premises, and it constituted an expense of operation which would have been refunded to cross-appellant if actually paid.

6. From the date of the execution of the respective leases and contracts of employment, the markets were operated under the exclusive control and supervision of cross-appellant, and the respective managers were fully instructed as to duties and responsibilities.

7. Contrary to the Finding of the trial court, the markets did not continue to operate without change after the execution of the leases and contract, as the management and control then passed to cross-appellant, who assumed all of the duties and liabilities of

ownership and operated the markets through its employee-managers, who were paid a percentage of profits.

8. The leases and contracts were not forbidden evasions of Maximum Price Regulation 169 and were legal and binding upon the parties, and cross-appellant sold no merchandise whatsoever to said markets, but only at retail ceiling prices to the public through said markets.

9. The evidence does not support the Finding of the trial court that the gross sales of the stocks in 1942 exceed $500,000.00, and such Finding has no relation to the issues in the case.

10. Cross-appellant received no money whatsoever in excess of ceilings fixed by Maximum Price Regulations 169.

11. The Finding of the trial court that cross-appellant should have cancelled the leases and contracts by September 15, 1943, was clearly erroneous and the date arbitrary. The evidence and the exhibits demonstrate cross-appellant's intention to seek a mutual cancellation as soon as it could be determined that the Office of Price Administration would not approve the operation of the markets by cross-appellant.

12. Cross-appellant took every practicable precaution against violating the regulation and was not responsible for any unreasonable delay in relinquishing the markets, but actually forced the issue upon lessors and managers when the local Office of Price Administration definitely disapproved.

13. The sole issue in the suit was an alleged viola-

tion of wholesale price ceilings on beef. No other meats or merchandise are involved. Had cross-appellant handled no beef, as it handled no veal, there would have been no lawsuit. There could have been no lawsuit under Price Regulation 169. When cross-appellant relinquished its percentage of the proceeds from beef on September 24, 1943, there was no further evasion under any possible construction of the law and the regulation.

14. Inasmuch as the Regulation and the suit relate exclusively to beef, it was obviously wrong to award judgment against cross-appellant for proceeds of all meats delivered, when 43% of the total was pork, lamb, ham, bacon and lard.

15. The trial court disregarded the sanctity of the contracts, and wrongfully assumed that the leases and the contracts could be forthwith terminated at the will of the cross-appellant.

16. The beneficent objects and purposes of the Price Control Act were defeated by the Office of Price Administration in its interference with cross-appellant's acquisition and operation of the retail markets.

ARGUMENT

There is not a word of evidence that the leases and contracts were not what they purported to be. It is a universally recognized principle of law that a contract fixes the rights and liabilities of the parties, and no assumptions or presumptions will be indulged in contrary to the evident purpose and intent of the contract; and a contract is to be construed as seeking to effect a legal rather than an illegal object.

Upon the execution of the two documents, cross-

appellant became the lessee in possession, and the second party to the contract of employment became the employee of cross-appellant. It will not be denied that cross-appellant could own and operate retail meat markets without offending any law or any regulation of the Office of Price Administration. It had owned and operated one for many years (Tr. 77).

When cross-appellant executed the leases, it assumed full liability for rental to the owners of the buildings in which the markets were located in those cases where the lessors were tenants. It assumed liability for any loss of merchandise contained in the markets by fire, flood or other casualty. It assumed liability for injuries to third persons. If a number of people had been poisoned by meat, poultry or fish purchased at the market, can there be any doubt about the liability of James Henry Packing Company? Cross-appellant assumed liability for all obligations incurred by the managers of the market, including the cost of all merchandise purchased for resale. It assumed liability for losses from uncollectible accounts. It assumed liability for loss or damage resulting from theft or robbery of the markets. It was charged with all of the liabilities and responsibilities of an owner of the market, which, in fact, it was.

No beef was sold to the individual managers. If there is a sale, title must pass. Title to the beef delivered to the markets never left cross-appellant until it was sold to the public at retail. The invoices sent to the markets with deliveries of beef were obviously for accounting purposes. The managers had no individual obligation to pay them. It would have been

absurd for the Packing Company to base a claim against the individual manager on the invoice. The production of the contract of employment would promptly defeat the claim.

The Packing Company and its manager were never in the relation of creditor and debtor, the manager's only obligation being to account to its employer for *all* receipts of the market. The money that went into the till of the market belonged to cross-appellant and not to the manager, and cross-appellant paid the manager out of such receipts his percentage of the profits. If the market cash register or safe had been robbed, it would have been cross-appellant's loss.

In now following somewhat the order of the Specifications of Error and Summary of Argument, clarity will require some repetition of the facts and circumstances set forth in the Statement of the Case.

1. Cross-appellant did not fail and neglect to take steps to terminate the leases and contracts.

The form of the lease and contract of employment had been submitted to Judge Hartson, the Chief Attorney for the Office of Price Administration, before any were executed. Judge Hartson approved the lease (Tr. 152 and 162) and not until the Sholley letter of July 30th (Plaintiff's Exhibit 1; Tr. 122) was received by counsel for cross-appellant was counsel informed that the documents had been referred to San Francisco for an opinion as to whether they offended the regulations or not, nor was the fact known to cross-appellant until Mr. Joseph's recovery from his illness in the latter part of August (Tr. 146).

In his letter Mr. Sholley said, "We referred copies of these documents to our San Francisco office for their opinion," but failed to state that the Regional office in San Francisco advised him that "each case must be decided on its own facts," and that it was "very dangerous to look at the draft of a document and say whether or not the transaction is valid" (Tr. 180).

Notwithstanding this caution from the Regional office, Mr. Sholley, in his letter of July 30th, rendered his personal decision that the leases were forbidden as an evasion pursuant to his interpretation of a general advice from the national office that "any arrangement which falls short of a complete transfer of ownership and operation of a retail outlet to the wholesaler must be deemed to be forbidden." He stated that "a clarifying amendment will soon be issued," and invited a further discussion with cross-appellant and counsel.

No further word was received from the Price Administration Office, but on August 23d counsel for cross-appellant secured a copy of the "clarifying amendment" and promptly wrote Judge Hartson with reference thereto (Defendant's Exhibit A-10; Tr. 147). In this letter counsel for cross-appellant stoutly maintained that the leases were not inhibited by the amendment and not an evasion, but stated:

> "If the Price Administrator should take the position that the leases were an evasion, then we must, of course, request our lessors to agree to a mutual cancellation."

It will thus be seen that even at this early stage of the proceedings, cross-appellant manifested and expressed its intent to abide by the ruling of the Office of Price Administration.

Counsel's letter was patently for the purpose of securing definite advice from the Office of Price Administration. It was the further discussion suggested in Mr. Sholley's letter. It specifically requested an interpretation of the amendment, but the Office of Price Administration did not see fit to reply, notwithstanding the testimony of Mr. Sholley that "my duties primarily are the furnishing of regulations and interpretations of various Maximum Price Regulations to other members of our staff and to the *members of the general public*" (Tr. 175).

Cross-appellant very naturally assumed that Judge Hartson and associates had accepted its counsel's interpretation as expressed in his letter of August 23d (Tr. 147), but one week later cross-appellant received a letter from the Litigation Attorney stating that, in his opinion, the lease-employment arrangement constituted an evasion of ceilings fixed in Price Regulation 169. He added that a reasonable time would be allowed cross-appellant to terminate the leases (Tr. 87).

Cross-appellant promptly answered the letter, stating that it was being referred to legal counsel for instructions on how to proceed to accomplish a cancellation of the leases and contracts (Defendant's Exhibit A-4; Tr. 89). While we look in vain in the transcript for some evidence of the activities of cross-appellant during the ensuing three weeks, the infer-

ence is plain that cross-appellant was not successful in accomplishing mutual cancellations.

"These people (the lessors) were all satisfied with their leases, were doing better, and did not want to cancel" (Tr. 158). From the general import of the testimony of cross-appellant's witnesses, it is apparent that cross-appellant and its counsel were perplexed by the attitude of the Price Administration Office. It had approved similar leases (Tr. 164). The arrangement was beneficial to all concerned, but the Litigation Attorney refused to be satisfied.

Cross-appellant and its counsel then reached the conclusion that inasmuch as the objection from the Price Administration Office was based on Regulation 169, which related exclusively to beef (and veal), if beef were eliminated in calculating the profit percentage of cross-appellant, there would be no further objection (Tr. 150).

Cross-appellant then wrote the letter of September 24th to each of its managers advising them: "In reporting receipts for the purpose of determining your commissions, omit or deduct all receipts from sales of beef and veal furnished by us."

A copy of this letter was at the same time mailed to the Litigation Attorney, with a letter stating that, "Pending our protest and appeal of the Regulation and your interpretation, we are relinquishing all profits from retail sales of beef and veal furnished by us, and are instructing our managers accordingly."

Thereafter the managers' earnings were augmented by the profit on beef furnished by cross-appellant (Tr. 21). This concession to the opinion or whim of the

Litigation Attorney should have satisfied any reasonable mind.

Subsequent to September 24th, there was no beef involved in the arrangement, so far as cross-appellant was concerned. Apparently the letter and enclosure of September 24th did not reach the Price Attorneys. At least cross-appellant was not given the benefit of their reaction to the elimination of beef (Judge Hartson had resigned and left the office (Tr. 160)), as on October 4th the Litigation Attorney, who, we assume from his title, was concerned only with litigation, wrote cross-appellant the following cryptic letter:

> "With reference to your letter of September 24, transmitting to us a copy of a form letter addressed to persons operating retail outlets under your direction, will you be good enough to inform us whether the deductions from the sales of meat products other than beef and veal, mentioned in your form letter, are still being made by these markets." (Defendant's Exhibit A-6; Tr. 94).

The Litigation Attorney's letter was indirect, but on October 11th, cross-appellant acknowledged the letter and answered what it interpreted to be the litigation attorney's question, stating that, "We have made no changes in our leases of retail meat markets other than to comply with your interpretation of the amendment to Maximum Price Regulation 169, as expressed in your letter of August 30, 1943."

This was the last communication from the Office of Price Administration, and on November second, following a conference at which counsel for cross-appellant was advised definitely that the deduction on beef

sales would not satisfy the Litigation Attorney (Tr. 151), cross-appellant wrote a letter to all of its managers, asking them to agree to a mutual cancellation of the leases and contracts of employment as of November 1, 1943 (Defendant's Exhibit A-8; Tr. 98). Cross-appellant discontinued its operations of the markets as of that date. The Litigation Attorney filed his suit three months later.

It is respectfully submitted that cross-appellant manifestly at all times was willing to accomplish a mutual cancellation of the leases and agreements upon definite advices from the Office of Price Administration.

2. Cross-appellant collected no money in excess of wholesale prices, as it sold no beef at wholesale.

Neither party to the leases and agreements, no creditor of either party, no taxing authority — in fact, no one except an administrative agency exceeding its purposes and powers — would contend that cross-appellant sold beef to its managers. The markets belonged to cross-appellant. The managers were in the employ of cross-appellant on a percentage basis.

The managers acquired no title to the beef and had no obligation to pay cross-appellant for the beef other than their responsibility to account to their employer. There were no sales and the Emergency Price Control Act and Price Regulation 169 issued thereunder had no application.

3. The leases and contracts could not be cancelled by cross-appellant, but only with the consent of the other parties.

Both the Office of Price Administration and the trial court condemned cross-appellant for not breaching its contracts. Although he declared the lease and contract free from fault (Tr. 195), the trial court assumed that cross-appellant had the right to cancel them. The trial court read into the documents the very condition which was deleted from the originals because of the criticism of Judge Hartson and Mr. Sholley.

The testimony clearly shows that at all times cross-appellant was aware of its legal responsibilities to its lessors and managers, even though such responsibilities were disregarded by the Office of Price Administration. The summary disposition of the leases and contracts by the Office of Price Administration and the trial court is difficult to reconcile with the sanctity of contract. If the leases and contracts constitute an offense against the Emergency Price Control Act, the lessors and managers were equally guilty with cross-appellant; and if at any stage of the proceedings the Office of Price Administration had given the parties a definite interpretation of the regulations and ordered leases and contracts abrogated, it no doubt would have been done and could have been done without either party incurring liability to the other for a breach of contract.

Instead, the Office of Price Administration refused to commit itself other than eventually to order cross-appellant to cancel its contracts, disregarding the rights and interests of the lessors and managers.

4. State sales tax and business taxes due from the markets were paid.

In its Finding of Fact V., the trial court found

> "that defendant neither during the life of said leases and contracts, nor at any time, paid or provided for the payment of any social security account for the alleged manager or other employees of said stores nor made any inquiry concerning same. That defendant neither during the life of said leases and contracts nor at any time filed any applications with the State of Washington for any license to operate said stores or any of them, as required by the laws of the State of Washington, nor did it pay any retail sales tax on any sales made by said stores nor make or file any returns showing any sales tax or business tax due said state from said stores as provided by the laws of the State of Washington."

Section 8370-4 of Remington's Revised Statutes of Washington (Laws of 1939, Chapter 225, Section 1, page 976) levies a business tax of one-fourth of one per cent upon sales at retail, to be paid by the seller; and Section 8370-16 of Remington's Revised Statutes of Washington (Laws of 1941, Chapter 76, Section 2) levies a tax of three per cent of the selling price on retail sales, to be paid by the purchaser, but collected by the seller. Retailers are required by the Act to make bi-monthly returns and remittance, and every retailer is required to register with the State Tax Commission (Laws of 1935, Chapter 180, Section 187).

The trial court was mislead by counsel for the plaintiff in a confusing cross-examination and made an

erroneous finding that these taxes had not been paid. These taxes were paid by the managers of cross-appellant and charged to expense of operation, as provided in the contract of employment (Tr. 155).

A business and occupation tax of one-tenth of one per cent—otherwise similar to the state business and occupation tax—was also levied on retailers under Seattle Ordinance Number 72630, effective July 4, 1943, and payable bi-monthly beginning August 31, 1943. This tax was of necessity also paid for cross-appellant by the market managers as an expense of operation.

Whether the returns were made in the name of cross-appellant or in the name of the respective markets is not apparent from the testimony, but is immaterial in any event, as the leases reserved to cross-appellant, the right at its election, to operate the markets under their former names (Tr. 18).

It would be superfluous to argue the fact of payment of these business and sales taxes. The facilities of the taxing authorities are so established that no one is permitted to escape payment. It is true that cross-appellant had not yet reported the names of its managers in its Social Security and Unemployment Compensation returns.

The names of the managers should perhaps have been included in the returns for these taxes filed September 15, 1943, for the bi-monthly period of July and August, but the period of employment of the managers was less than two months, as the contracts were made during the month of July. Counsel for cross-appellant had called attention to the neces-

sity of including the employees, but it was overlooked (Tr. 155). The returns for the bi-monthly period of September and October were not due until November 15th, before which time cross-appellant had ceased to operate the markets. Legal formalities incidental to the leasing of the markets to cross-appellant which were neglected should be charged to counsel and not to cross-appellant, and it is submitted that the matters pointed out by the trial court in Finding of Fact V. are either erroneous or too trivial to be of any persuasive force to the contention that the leases were not bona fide.

5. The monthly rental reserved in each lease was not an arbitrary amount.

In each lease cross-appellant agreed to pay a reasonable monthly rental to the lessor, who, in each case, became market manager. The amount of the rent was not actually paid by cross-appellant to lessors. It would have been but an idle gesture, inasmuch as the contract of employment required that all expenses of operation be deducted before managers' commissions were paid. The amount of the rent would have been refunded to cross-appellant had it been actually paid (Tr. 100). However, if the manager had been replaced for breach of duty or other cause, the rent would be due and payable to the lessor, as he would be no longer accountable for the expenses of operation under the terms of the contract of employment. The contention of counsel for the plaintiff that the failure of cross-appellant to actually deliver a check for the rent cast a cloud upon the lease is without merit. Rent was an expense of operation no different from

the cost of the telephone, heat and light. These expenses of operation were not paid by the manager. They were paid by cross-appellant. The money in the market till belonged to cross-appellant, not the manager; and if cross-appellant had sent a check for the rent, it would have at the same time reimbursed itself the amount before paying the manager his percentage of profits. It would seem unnecessary to labor the point further, but even if the rental reserved in the leases was the nominal sum of $1.00—which it could well have been, in view of the fact that the premises were of no value to the lessor and former owner of the market, who had no meat to sell — such nominal rental would not have affected the validity of the lease.

6-7. The markets were actually operated and under the exclusive control of cross-appellant.

Following the execution of the lease and contracts of employment, cross-appellant was in exclusive possession of the markets and operated them. The former owners were there only in the capacity of an employee. The contract of employment (Exhibit B; Tr. 19) fully defines the duties of the manager. Upon the conclusion of the 25 leases, cross-appellant instructed all managers in writing with reference to Government regulations (Defendant's Exhibit A-1; Tr. 76) and furnished all managers with forms for making daily sales reports and ordered large signs made for each market, identifying it as the property of James Henry Packing Company (Tr. 79). That the officers of cross-appellant were well aware of its

ownership of the markets and the liabilities thereby assumed is too plain for argument.

Mr. Joseph, the president and general manager, and an experienced business executive (Tr. 73), was also acting under advice of counsel. He covered the markets with liability insurance (Tr. 85). The contention that cross-appellant was not the actual operator of the markets is entirely without merit, and the trial court's finding that the operation, management and control of said 25 markets continued in every way without change after the execution of said leases and contracts as before (Tr. 31), finds no support in the evidence.

8. The leases and contracts were not forbidden evasions of Maximum Price Regulation 169.

No contention has been made that cross-appellant could not legally own retail meat markets. These markets were wholly owned and operated by cross-appellant. There is nothing in the instruments themselves, and there is nothing in the evidence suggesting invalidity. The leases and contracts were absolute and exactly what they purported to be in form and in fact.

In his oral decision the trial court said:

> "If these two instruments, which are called the lease and the contract of employment, were effective instruments for what they purported to be, then I do not believe there was a violation. The terminology of the lease and of the contract of employment is not at fault."

and then proceeded to hold them invalid upon the theory that they did not bind the parties.

9. The trial court erroneously admitted in evidence copies of Maximum Price Regulations 355 and 336 relating to the classification of stores (Tr. 176).

These exhibits and the testimony with reference thereto are irrelevant and immaterial, and, in any event, the court's Finding of Fact VII., as to the amount of gross sales of the 25 markets in the year 1942, was clearly erroneous. The only testimony adduced on this point was the cross-examination of Mr. Joseph, who repeatedly stated that he had no knowledge and no means of knowing what such gross sales were (Tr. 166).

10. Cross-appellant received no money in excess of ceilings fixed by Price Regulation 169.

From the inception of the case, the Office of Price Administration proceeded upon the erroneous theory that the Packing Company was being paid money by the markets, and the trial court adopted this fallacy. As has been pointed out, every dollar received from sales at retail *belonged* to cross-appellant, and every pound of merchandise in the markets belonged to cross-appellant until sold to the public at retail.

11-12-13. Penalty would be excessive.

We are reluctant to expand this brief. It already approaches prolixity, but we now come to that act of the trial court, which, if not corrected by this court, will impose upon cross-appellant a burden so grievous as to be entirely out of line with the nature of the transaction.

The controlling statute is Section 108(b) of the Stabilization Extension Act of 1944 (58 Stat. 632; Title 50 U.S.C.A., App. 901) amending Subsection (e)

of Section 205 of the Emergency Price Control Act of 1942. After fixing liability for violations of price ceilings at not more than three times the amount of overcharge, there is a proviso:

> "That such amount shall be the amount of the overcharge or overcharges or $25.00, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation."

The penalty imposed upon cross-appellant by the trial court for the term beginning September 15, 1943, and ending November 8, 1943, brought upon cross-appellant a far heavier penalty, of which both court and counsel were unaware at the time.

During the time involved in this case, cross-appellant and many other packing companies were and still are able to operate only by the grace of Government subsidies. Cross-appellant was receiving subsidies on beef processed under authority of Executive Order Number 9250 (7 F.R. 7871) as amended by Executive Order Number 9381 (8 F.R. 13083), which subsidies were being paid by the Defense Supplies Corporation upon claim duly filed by cross-appellant in the amount of subsidies allowable for a given term on the quantity of livestock processed.

Section 7003.10, of Livestock Slaughter Payments Regulation Number 3, Revised, of Defense Supplies Corporation provides that:

> "Defense Supplies Corporation shall have the right to declare invalid, in whole or in part, any claim which does not meet the requirements of

this regulation, and any claim filed by an applicant who, in the judgment of the War Food Administrator or the Price Administrator, has wilfully violated any regulation of their respective agencies applicable to the purchase or sale of livestock or to livestock slaughter or to the sale or distribution of meat."

Section 7003.9 of the same regulation reads:

"Preliminary approval and payment of claims shall not constitute final acceptance of the validity or amount of the claim. On a finding that the claim is invalid or defective, Defense Supplies Corporation shall have the right to require restitution of any payment or any part thereof. Any sums found to be due to Defense Supplies Corporation shall be deductible against any accrued or subsequent claim for any payment by Defense Supplies Corporation to the person."

NOTE: By amendments to Livestock Slaughter Payments Regulation Number 3 Revised, effective July 1, 1945, "Reconstruction Finance Corporation" was substituted for "Defense Supplies Corporation," and "Secretary of Agriculture" was substituted for "War Food Administrator."

Section 2, amending Section 3(b) of Directive 55 of the Economic Stabilization Director (10 F.R. 6595), reads as follows:

"Upon *nisi prius* determination in a civil action or proceeding (including a proceeding before a hearing commissioner) against an applicant for payment, that such applicant has violated any substantive provision of an Office of Price Administration meat or livestock regulation or order, the Office of Price Administration shall

certify the determination to the Secretary of Agriculture, including the period of time during which the violation is found to have occurred. The Secretary of Agriculture shall thereupon withhold payment on all claims of the applicant under this directive for the accounting period in which the violation is found to have occurred. In the event that the determination of violation shall be reversed and such reversal becomes final, the amount of subsidy withheld pursuant to this paragraph shall be paid forthwith. For the purposes of this section, every provision of the regulation or order shall be deemed substantive in nature unless the Office of Price Administration determines otherwise."

Directive 55 was issued July 1, 1945, and amended July 13, 1945. Should it be held retroactive, cross-appellant could be held to a refund of all subsidies received from July to October, 1943, inclusive, approximating $55,363.03, and not less than $24,-413.46, the subsidies received from September 15th to November 1, 1943, if the decision of the trial court that the evasion was wilful during that period is not reversed.

In his oral decision (Tr. 192) the trial court, in commenting upon the government's voluntary dismissal of the indictments returned against Mr. Joseph, said:

"It is enough to say that the evidence introduced in the case at bar, would, in the judgment of the court, not have sustained that degree of wilful and unlawful violation of the Act to have supported a criminal prosecution or conviction, but that is quite another matter from

passing upon the question as to whether or not there was this civil violation." (Tr. 195)

In his decision the court further said:

"This defendant, with advice of able counsel, gave thought and consideration to the regulation without an intent to violate it, but with a desire to comply with it." (Tr. 196)

and

"I do not hesitate to find as a fact, there was neither a wilful violation nor was such violation the result of a failure to take practical precautions against the occurrence of a violation during the month of July." (Tr. 200)

The court also found no wilful violation or failure to take practicable precautions during the month of August (Tr. 201), and, upon being reminded by counsel that the letter of August 30th (Defendant's Exhibit A-3; Tr. 87) allowed a reasonable time in which to effect termination of the leases and contracts, he exonerated cross-appellant from a wilful violation or failure to take practicable precautions for the first half of the month of September upon the theory that cross-appellant should have and could have terminated the leases and contracts within that time.

An analysis of the trial court's decision that cross-appellant wilfully violated the regulation during the final six weeks of the operation prompty discloses its error. There were then 23 stores being operated by cross-appellant, each under a formal lease for one year, with no privilege of cancellation, and each by a manager employed under a formal contract for a term of one year. Each party of the second part, upon the eve of failure in business, was given lucrative em-

ployment by cross-appellant. Each consummated a lease of his property to cross-appellant with all the formalities of any legal contract. The leases and contracts were not unilateral. An attempted cancellation by one party would constitute a breach, even subjecting such a party to damages.

It has been shown that these men did not want their leases cancelled and their employment terminated. The patent error of the trial court was the assumption that cross-appellant could cancel these contracts and that cross-appellant should have cancelled these contracts upon the interpretation of a law by an employee of an administrative agency whose interpretation was no more binding upon a court than the interpretation of cross-appellant.

Cross-appellant was never given the benefit of an interpretation by the Chief Attorney or his assistant. On September 24th, in deference to the interpretation of the Litigation Attorney, cross-appellant relinquished all profits on beef, which resulted in increasing the commissions of its managers. It is earnestly submitted that from that time on the leases and contracts bore no relation whatsoever to Maximum Price Regulation 169 dealing only with beef. The result was the same as if no beef had been handled, as in the case of veal. Wherein lies the wilfulness or the failure of cross-appellant to take practicable precautions?

The trial court found that cross-appellant was trying to obey and not violate the regulation. He credited cross-appellant with good faith in the transaction up to the time when he assumed that cross-appellant could

do that which it was not permitted to do without breaching its own contract.

The word "wilful" was construed by the Supreme Court in *Felton v. United States*, 96 U.S. 699, 702, in the following language:

> "To do or omit doing a thing knowingly and wilfully implies not only a knowledge of the thing but a determination with a bad intent to do it or omit doing it. 'The word wilfully,' says Chief Justice Shaw, 'in the ordinary sense in which it is used in statutes means not merely voluntary but with a bad purpose.' "

If entering into a legal contract which kept 25 meat markets from closing and enabled it to distribute graded and inspected meats to the public at retail ceiling prices, benefitting all and injuring no one was a bad purpose, then cross-appellant wilfully violated the regulation.

The imposition of the penalty was clearly wrong.

14. The judgment, if any, should have been for only 57% of the profits made by cross-appellant.

The parties stipulated (Tr. 21) only 57% of the profits made by cross-appellant were derived from beef. It was clearly erroneous for the trial court to punish cross-appellant for handling pork, lamb, ham, bacon and lard in a suit involving only a beef regulation.

15. The trial court disregarded the leases and contracts.

To enable it to apply its interpretation of an administrative regulation and after finding the leases and contracts free from ambiguities, the court set them aside upon a collateral attack and in an action

to which the lessors and employee-managers were not a party.

16. It was the act of the Office of Price Administration and not that of cross-appellant that defeated the objects and purposes of the price control law.

While the principal objective of the Emergency Price Control Act was to prevent inflation, other objects and purposes stated in the preamble include preventing hardships to persons engaged in business and assisting in adequate production of commodities.

In *Brown v. Mars*, 135 F. (2d) 843, at page 848, the court said:

> "The prime purpose of the Act is to prevent undue inflation in commodities and services during the War, and in *Yakus v. United States*, 64 S. Ct. 680, the higher court echoed the opinion of the Circuit Court in saying:
>
> " 'The purposes of the Act specified in Section 1 denote the objectives to be sought by the Administrator in fixing prices—the prevention of inflation and its enumerated consequences.' "

In overruling the Price Administrator's contention that the distribution of dividends to members of a cooperative dairy association, which also sold milk and cream to the public, was a violation of price ceilings, District Judge Schwellenbach said:

> "In the final analysis the control at the point of the *price to the ultimate consumer* is the only one which can directly serve to prevent inflation. The amount of money which goes into circulation as the result of the production and distribution

of a product depends exclusively upon that *final price.*"

Bowles v. Inland Empire Dairy Association, 53 F. Supp. 210, page 218.

In *Hecht Company v. Bowles*, 84 Supreme Court Reporter 587, all courts were admonished to exercise their discretion in the light of the large objectives of the Act, namely, the war against inflation. The leasing of these retail markets by cross-appellant provided a legitimate channel for the distribution of inspected beef to the public without adding one penny of cost to the public. Its open and legal distribution of inspected meat to the public to some extent reduced the operations of the black markets, thereby assisting the Government in accomplishing the prime purpose of the law—the prevention of inflation.

While we are content to present the facts and ask this court to apply the law, it may be helpful to point out that our exhaustive search for parallel cases has proved almost futile. The fact that there are no other such cases is significant, for we venture the assumption that there were similar market operations in other jurisdictions as there were in this jurisdiction.

However, in the cases of *Bowles, Administrator, v. Kraft Cheese Company* (Wisconsin, unreported), Judge Stone of the District Court for the Western District of Wisconsin, in a similar action by the Administrator involving leases of small dairies and contracts employing the former owners as managers, and similar to the leases and contracts involved in this case except that they were subject to cancellation on one month's notice, held the leases and contracts

bona fide and not a violation of wholesale price ceilings on dairy products (Civil Action Number 679 decided September 1, 1944).

We conclude with the observation that artificial control of prices of commodities is repugnant to the American conception of free trade and enterprise, even unconstitutional; that even war does not abrogate freedom of contract, but in any event, cross-appellant did not violate, but contributed to the enforcement of the Emergency Price Control Act and Regulation 169, benefitting the retail market operator, itself, and the general public and injuring no one.

The judgment of the District Court should be reversed.

Respectfully submitted,

ALMON RAY SMITH
HENRY CLAY AGNEW
Attorneys for Appellee and Cross-Appellant.

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11089

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

JAMES HENRY PACKING COMPANY, A CORPORATION, APPELLEE

JAMES HENRY PACKING COMPANY, A CORPORATION, APPELLANT

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF CROSS-APPELLEE

CHESTER BOWLES, Administrator, Office of Price Administration

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
MILTON KLEIN,
Director, Litigation Division,
DAVID LONDON,
Chief, Appellate Branch,
SAMUEL ROSENWEIN,
Attorney,
Office of Price Administration, Washington 25, D. C.

HERBERT BENT,
Regional Litigation Attorney,
San Francisco, California.

INDEX

I

II

III

AUTHORITIES CITED

682226—46——1

In the United States Circuit Court of Appeals for the Ninth Circuit

---

No. 11089

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLANT

v.

JAMES HENRY PACKING COMPANY, A CORPORATION, APPELLEE

JAMES HENRY PACKING COMPANY, A CORPORATION, APPELLANT

v.

CHESTER BOWLES, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF CROSS-APPELLEE

CHESTER BOWLES, Administrator, Office of Price Administration

The main brief of the Administrator took the position that the evidence adduced at the trial overwhelmingly supported the findings of the Court, that the

conduct of the cross-appellee had been wilful within the purview of section 205 (e) of the Act, that it had been marked by deception and subterfuge, and that in the exercise of a sound judicial discretion measured by the requirements and purposes of the Price Control Act and the Regulation promulgated thereunder (See also Appendix in main brief) judgment in treble the amount of overcharges should have been granted.

The cross-appellant seeks a reversal first, on the ground that the District Court erred in its findings of fact; secondly, that the Court erred in its conclusions of law; and thirdly, that the Court erred in assessing any statutory damages, even if the violation were established.

The answer of the Price Administrator, in short, is as follows:

First, the findings of the District Court were not "clearly erroneous" Rule 52, Federal Rules of Civil Procedure, 28 U. S. Code foll. section 723c. They were clearly correct. The cross-appellant overlooks, or misapprehends, the record.

Secondly, the conclusions of law of the District Court flowed inevitably from the findings of fact, and the evidence supporting those findings.

Thirdly, the cross-appellant presents no mitigating circumstance to justify an assessment of less than full statutory damages. Its opposition to the Price Control Act and the applicable regulation remains undiminished.

I

The evidence adduced at the trial established a patent evasion of the Act and the regulation promulgated thereunder

In essence, the trial of the action revealed that the cross-appellant desired a greater amount for his meat than he could lawfully charge under the regulation; that he obtained this additional sum through the payment by the retailer of an additional 10% of the retailer's gross profit; that the device used to evade the price limitation contained in the Regulation was the "lease" and "contract of employment"; that the "lease" and "contract of employment" were never intended to do what they purported to do; and that in actuality the situation after the execution of the instruments was exactly the same as it had been before—except that the cross-appellant had an additional $19,149.64 for his meat. The discussion of the evidence is contained in the Administrator's main brief (pp. 7–11, 13–15, 26–32).

The cross-appellant here quarrels with the facts:

(a) It states in its brief (p. 3) that "it was not possible to buy livestock on the market and process it except at a loss." The Court refused to so find (R. 203).

(b) It states in its brief (p. 3) that the retailers requested cross-appellant to take over their markets. The Court was of the opinion that the request came from cross-appellant, and in a different form (R. 197). The Court had the opportunity to judge the credibility of the witnesses. See Rule 52, Federal Rules of Civil

Procedure, 28 United States Code foll. section 723c.

(c) The cross-appellant states that the rentals reserved in the leases were the reasonable rental values of the markets (p. 4). The Court below stated (R. 198): "The rentals that were fixed, the Court must find were arbitrarily fixed and were never fixed with any thought of actually being paid, *because there is no basis at all* to show why the minimum rental should be $25.00 as indicated by the stipulation in the evidence, and the maximum $35.00, when some of the places did a volume of business that went three and four times, according to the evidence, what it did in others."

(d) The cross-appellant states (Br. p. 4) that it ordered signs bearing its name; but in a period of four months not one sign had gone up (R. 79).

(e) The cross-appellant states that upon objection by the OPA it eliminated a cancellation clause in the lease, submitted the redrafted lease to the Office of Price Administration, and then negotiated the 25 leases and contracts (Br. pp. 4–5). It neglects to state that the employee of the Office of Price Administration to whom it showed the lease stated "that the answer must come from the Regional Office" (R. 162)—and that cross-appellant did not wait for the answer (R. 13).

(f) The cross-appellant insists that the chief attorney in the district Office of Price Administration approved its lease (Br. p. 17). The attorney denied that he had given such approval (R. 162, 163) and the Court refused to find that he had (R. 204).

(g) Cross-appellant states that it was not until July 30 that it was informed that its documents had been referred to the regional office (Br. p. 17), when actually it was so informed on July 1 (R. 160, 162)—and it insists that it had no knowledge that its conduct offended the regulation until the latter part of August (Br. p. 17), while conceding that its counsel and secretary (R. 153) received the letter of disapproval from the Office of Price Administration on July 31 (Br. p. 17).

(h) The cross-appellant states that similar leases had been approved by the Office of Price Administration (Br. p. 20). The record does not support that assertion.

(i) Cross-appellant characterizes its arrangement to reduce the payment by retailers of a percentage of the profits after September 24 (from 10% to 5%) as a "concession to the opinion or whim of the Litigation Attorney" (Br. p. 20). The evidence gives a different face to the transaction. The Office of Price Administration had informed cross-appellant that *any* deduction from gross sales of the retailers was a violation of the Regulation (R. 122, 187). The subsequent device of taking 5% instead of 10% of the retailers' profit was never revealed to the Office of Price Administration (R. 91–96).

(j) Cross-appellant asserts that the Court's Finding of Fact V is either "erroneous or too trivial to be of any persuasive force to the contention that the leases were not bona fide" (Br. p. 26). Finding of Fact V summarizes the evidence at the trial which disclosed that cross-appellant never paid or provided for pay-

ment of any social security tax for its alleged managers; never applied for a license to operate the stores; never paid any retail sales tax, nor filed any return; never inquired concerning the terms of the leases between the retailers and owners of the premises; that the rent fixed by cross-appellant was an arbitrary rent; that cross-appellant never gave any instructions as to the management of the markets, nor authorized any obligations incurred by the markets; that no notice of any change in operations was ever given to the public, and there actually was no change in operations; and that the retailers were required to pay cross-appellant a percentage of their gross sales of all meats in addition to the ceiling prices fixed by the Regulation (R. 30).

It is submitted that the evidence clearly supports the findings of the Court; that the findings were not "clearly erroneous", but were clearly correct. *Clark Bros. Co.* v. *Portex Oil Co.,* 113 F. 2d 45, 47 (C. C. A. 9th 1940); *United States* v. *Aluminum Company of America,* 148 F. 2d 416, 433 (C. C. A. 2d, 1945), opinion by L. Hand, J.

II

The alleged lease and contract of employment were clearly designed to evade the Act and Regulation. The violation was conclusively established.

The cross-appellant argues (Br. p. 16, 23) that the "lease" and "contract of employment" created fixed obligations between itself and the managers; and that it assumed certain risks of loss with respect to third parties; that if it abrogated the contracts, it would incur liability for their breach.

This argument avoids the issue (See the discussion in the Administrator's main brief, pp. 13–18). Mere terminology in the contract is not decisive. Nor, indeed, does the allocation of risks between the parties and their rights inter se, necessarily control when the rights of the Price Administrator in his enforcement of the anti-inflation Act intervene. Compare, *United States* v. *Masonite Corporation,* 316 U. S. 265, 276; and cases cited in main brief (pp. 13–18). The enforcement of the Price Control Act is not intended to turn upon technical concepts of the law of contracts. Compare, *United States* v. *Lutz,* 142 F. 2d 985, 989 (C. C. A. 3rd, 1944).

The gravamen is the evasion of the price limitations contained in the Regulation by "direct or indirect methods;" the execution of an instrument devised to circumvent the statute and regulation. This the parties may not do. *Taylor* v. *United States* 142 F. 2d 808 (C. C. A. 9th, 1944); United States, ex rel *Brown* v. *Lederer,* 140 F. 2d 136 (C. C. A. 7th, 1944) cert. den. 322 U. S. 734.

Two cases recently decided in the Tenth and Seventh Circuits indicate the uniform condemnation of agreements designed to evade the provisions of the Price Control Act and the pertinent regulations thereunder. In *Schreffler* v. *Bowles* (C. C. A. 10th, January 12, 1946, unreported), a suit was instituted by the Price Administrator for treble damages under section 205 (e). Among other defenses, defendant pleaded an agreement with its customers which purported to appoint the defendant as a servant of his customer. De-

fendant argued that he was not subject to the Act because he was not engaged in the purchase and sale of any commodities. The District Court granted the motion for summary judgment. In affirming the judgment, the Circuit Court stated:

> The only defense which presented any possible factual question for trial was the eighth defense. The substance of this defense was that appellants were not subject to the Price Control Act or the regulations promulgated thereunder because they were not engaged in the purchase and sale of iron and steel products, but were merely acting as the servants of the various concerns with whom they were dealing. Appellants seek support for this position in a letter written by Aircraft Mechanics, Inc., dated February 26, 1943. The letter was written approximately a year after the relations between the parties had been established. It was apparently written for the purpose of clarifying these relations. It is long and detailed, and no attempt will be made to analyze its provisions in detail. It contains many of the elements of a contract of sale and purchase. The court was warranted in concluding that there was a sale and purchase, but the decision does not turn upon that point. Price Regulation No. 49 provides: "The price limitations as set forth in Price Schedule No. 49 shall not be evaded either by direct or indirect methods in connection with a purchase, sale, barter, delivery or transfer of iron or steel products alone or in conjunction with any other material, or by way of any commission, service, transportation, or other charge, or by way of

> discount, premium, or other privilege, or by way of tying agreement or other trade understanding, or otherwise." A reading of the entire letter leads to the inescapable conclusion that it exhibits a clear intent to evade the maximum price regulation by way of "commission, service, or otherwise." The gravamen is the evasion of a price limitation by direct or indirect methods, and this the parties may not do. The court was warranted in holding that the alleged contract was merely an effort to evade the Act and the regulations promulgated thereunder. The pleadings presented no substantial issue of fact. The only question was the legal inferences and conclusions to be drawn therefrom. The case was properly disposed of under the rule providing for summary judgment proceedings. We find no error in the proceedings before the trial court, and the judgment is therefore affirmed.

In *United States* v. *Steiner and Miller* (C. C. A. 7th, December 18, 1945, unreported), defendants were auctioneers who delivered tractors to the competitive bidder making the highest bid under an instrument termed a "Lease of Equipment." Under the terms of the "lease" the entire amount of the purported rental of the implements over a period of ten years was required to be paid before the "lessee" could take possession of the implement. In affirming the conviction, the Circuit Court states:

> The evidence discloses that there was executed at the time of the transfer and delivery of the implements in question an instrument designated as a "Lease of Equipment" which

was signed in a majority of the cases by the owner of the property therein designated as "the lessor" and the person to whom such implements were transferred and delivered and designated in the instrument as "the lessee." As before stated, it is the contention of the defendants that the transaction was, in fact, a lease, not a sale, and that, therefore, they (the defendants) did not violate the law, as charged in the indictments. It is important, therefore, to examine the instrument and the testimony of the witnesses to determine the question of whether this was, in fact, a good faith lease, or whether it was an instrument devised by the defendants to circumvent the statute and regulation. Such instrument was devised and prepared by the defendants or under their direction. The fact that it was entitled a "lease" does not mean, necessarily, that it was, in reality, a "lease," and not a contract of sale. The provisions of the instrument were the same in each instance, with the exception of "the character of the implement, the names of the parties (lessor and lessee) and the amount of the rental."

* * * * *

The mere fact that the equipment may have been leased would not necessarily be in violation of the law. But, if the purported lease was simply a vehicle for the circumvention of the law, and the transaction was, in reality, a sale—not a lease—and the price received was over and above the maximum or ceiling price, then, such transaction would be in violation of the law and regulation if done knowingly, intentionally and wilfully. It cannot be denied that

> the amount received by the owner of the implements—whether it be termed rental or sale price was greatly in excess of the maximum or ceiling sale price of such implements. A careful examination of the "lease" and of the evidence leaves no doubt that the transactions were a wilfull attempt upon the part of the defendants to circumvent and evade the law and regulation, that such transactions were outright sales, and not leases, and were in excess of the maximum or ceiling prices as fixed by the law and regulation. There was competent and substantial evidence to support the verdict of the jury. * * *

It is submitted that the conclusion of law of the District Court that the leases and contracts made here by cross-appellant were forbidden evasions of the Reguation is amply supported in law and in fact. Cases cited by the cross-appellant (Br. pp. 36–38) are not to the contrary, and upon critical examination support the Administrator's position. In the Inland Empire Dairy Association and Kraft Cheese Company cases, involving farm cooperatives, the District Court found that the transactions were not intended as devices to evade the regulation; here the District Court found that they were so intended.

III

The evidence clearly establishes a wilful and deliberate violation of the Regulation by evasion and artifice. The cross-appellant remains unreconciled to the restraints of the Act and Regulation. The sound requirements of the Act necessitated the assessment of treble damages

The position of the Administrator that "discretion" within the meaning of section 205 (e) of the Emer-

gency Price Control Act is a sound judicial discretion exercised in the light of the public purposes of the statute has been discussed in his main brief (pp. 19–25). There was also set forth his contention that it was reversible error for the court to refuse to assess damages for a part of the period when the violations occurred, and an abuse of discretion to award less than treble the amount of overcharges for the entire period (pp. 25–32). The arguments of the cross-appellant here fortify the position of the Administrator.

The cross-appellant concedes that on August 30 it received a second letter from the Office of Price Administration (Deft.'s Exh. A–3, R. 87) advising it that its transactions constituted an evasion of the Regulation, requesting termination of the arrangements, and information as to the progress in bringing about rescissions.

What did the cross-appellant do to avoid further violations after being thrice told that its conduct was unlawful (R. 162, 122, 87)? The cross-appellant states (Br. p. 19); "While we look in vain in the transcript for some evidence of the activities of cross-appellant during the ensuing three weeks (after August 30), the inference is plain that cross-appellant was not successful in accomplishing mutual cancellations."

The plain, undisputed facts are that the cross-appellant spent the next three weeks devising a new method to evade the Regulation by accepting 5 to 7% of the retailers' gross profit, instead of 10% (R. 91–93). It made no attempt to cancel its arrangements;

on the contrary, its efforts were directed towards their continuance.

When, on October 4, the Office of Price Administration inquired whether the deductions from gross sales were still being made by the markets (Deft.'s Exh. A–6, R. 94), the cross-appellant, who was then receiving 5 to 7% of the retailers' profits in addition to the ceiling prices of the meat, replied: "We have made no changes in our leases of retail meat markets other than to comply with your interpretation of the amendment to Maximum Price Regulation 169, as expressed in your letter of August 30, 1943" (Deft.'s Exh. A–7, R–96).

It is submitted that the cross-appellant wilfully and deliberately violated the Act and Regulation by trick, artifice and subterfuge. Its conduct demonstrated a callous disregard of the provisions of the Price Control Law. It deviates only once from its thesis that the "artificial control of prices of commodities is repugnant to the American conception of free trade and enterprise" (Br. p. 38) to remind this Court that if the judgment is permitted to stand it may be deprived of government subsidies (Br. pp. 30–32).

CONCLUSION

It is respectfully submitted that the judgment herein should be affirmed except insofar as it awards damages in the sum of only $21,726.89, and in that respect, the judgment should be vacated with direc-

tions to enter judgment in a sum treble the amount of the overcharges, as demanded in the complaint.

Respectfully submitted.

GEORGE MONCHARSH,
Deputy Administrator for Enforcement,
MILTON KLEIN,
Director, Litigation Division,
DAVID LONDON,
Chief, Appellate Branch,
SAMUEL ROSENWEIN,
Attorney,
Office of Price Administration, Washington 25, D. C.

HERBERT BENT,
Regional Litigation Attorney,
San Francisco, California.

U. S. GOVERNMENT PRINTING OFFICE: 1946

No. 11089

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

CHESTER BOWLES, Administrator, Office of Price Administration, *Appellant*,

vs.

JAMES HENRY PACKING COMPANY, a Corporation, *Appellee*.

JAMES HENRY PACKING COMPANY, a Corporation, *Cross-Appellant*,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration, *Cross-Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

REPLY BRIEF OF CROSS-APPELLANT, JAMES HENRY PACKING COMPANY

ALMON RAY SMITH
800 Northern Life Tower
Seattle 1, Washington

HENRY CLAY AGNEW
1103 Smith Tower
Seattle 1, Washington
Attorneys for Appellee and Cross-Appellant.

THE ARGUS PRESS, SEATTLE

No. 11089

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHESTER BOWLES, Administrator, Office of Price Administration, *Appellant*,

vs.

JAMES HENRY PACKING COMPANY, a Corporation, *Appellee*.

JAMES HENRY PACKING COMPANY, a Corporation, *Cross-Appellant*,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration, *Cross-Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

REPLY BRIEF OF CROSS-APPELLANT, JAMES HENRY PACKING COMPANY

ALMON RAY SMITH
800 Northern Life Tower
Seattle 1, Washington

HENRY CLAY AGNEW
1103 Smith Tower
Seattle 1, Washington
Attorneys for Appellee and Cross-Appellant.

THE ARGUS PRESS, SEATTLE

SUBJECT INDEX

TABLE OF CASES

STATUTES

149 F (2) 398

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CHESTER BOWLES, Administrator, Office of Price Administration, *Appellant*,

vs.

JAMES HENRY PACKING COMPANY, a Corporation, *Appellee*.

JAMES HENRY PACKING COMPANY, a Corporation, *Cross-Appellant*,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration, *Cross-Appellee*.

No. 11089

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

REPLY BRIEF OF CROSS-APPELLANT, JAMES HENRY PACKING COMPANY

I.

STATEMENT OF CONSIDERATIONS ACCOMPANYING AMENDMENT TO MAXIMUM PRICE REGULATION 169.

The appendix to the opening brief of the Appellant Administrator is a copy of the Statement of Considerations Accompanying Amendment to Section

1364.406 of Maximum Price Regulation 169 relating to retail markets.

Before directing attention to specific parts of the Statement, cross-appellant reminds the court that, by its answer, it denied that it sold any beef or veal carcasses, or wholesale cuts thereof, as alleged in the complaint, and pleaded affirmatively that the individuals named in Exhibit "A" of the complaint were at all times mentioned therein the employes of cross-appellant.

The Statement of Considerations above referred to accompanied the amendment of August 16, 1943, to Maximum Price Regulation 169. The amendment reads as follows:

> "(c) Any transaction, device or arrangement whereby a person who sells, transfers, or delivers beef or veal to a retail establishment not wholly owned and operated by such person receives for the beef or veal a greater realization than he would be entitled to receive under this regulation for the sale of such beef or veal to a retailer is a violation of this regulation and is prohibited."

The following excerpts from the Statement of Considerations demonstrate that the regulation as amended was not intended to prevent the operation of retail meat markets by a wholesaler:

> "The prohibition does not apply to the ownership and operation of a retail store by a slaughterer or wholesaler."
>
> "The prohibition does not extend to cases where the slaughterer purchases unconditionally a retail establishment and operates the establishment for the sale of meat slaughtered by him. Such

an arrangement cannot be regarded as an evasion of the regulation. The slaughterer assumes the full economic burden of maintaining the retail establishment. Only so long as he discharges that burden in full can he realize the benefits sought. And he assumes the risk of loss should the maintenance of the establishment for any reason become undesirable. The magnitude of the economic risk involved is a sufficient guarantee that the expedient will not be adopted to such an extent as to bring about the consequences previously explained. Moreover, there is precedent in the industry for this type of transaction, precedent which is wholly lacking for the evasive devices which the accompanying amendment expressly prohibits."

One of the "precedents" in the industry is cross-appellant's own retail market in Seattle, which it had owned and operated for many years (Tr. 77).

Cross-appellant did assume

"the full economic burden of maintaining the retail establishment."

We challenge the Administrator to point out a single burden, responsibility or liability of the owner of a retail market which cross-appellant did not assume when it accepted the leases and contracted with the former owners to manage the markets.

II.

FINDINGS OF THE TRIAL COURT THAT WERE CLEARLY ERRONEOUS

Risking repetition of matters contained in our opening brief, we here point out a few of the findings made

by the trial court which are obviously not supported by the evidence.

1. In Finding of Fact III the court found:

> "That on July 30, 1943, said Chief Attorney notified defendant by letter that said modified leases and contracts constituted an evasion of Maximum Price Regulation 169, and again on August 30, 1943, the Chief Enforcement Attorney notified defendant by letter that said leases and contracts were an evasion. * * *"

The "notices" were far from being the absolute and authoritative documents indicated by the court's finding. Mr. Sholley's letter of July 30, 1943, stated:

> "In view of this expression of policy, this office *now is of the opinion* that the proposed leasing arrangements between James Henry Packing Co. and various retail meat markets in the City of Seattle are forbidden evasions of Revised Maximum Price Regulation 169." (Tr. 123)

And Mr. Stoneman's letter of August 30, 1943, stated:

> "Suffice it to say that *in our opinion* the effect of this lease-employment arrangement * * * is for your firm to secure a higher price for its meat than is permitted by Maximum Price Regulation 169." (Tr. 87)

Cross-appellant and its counsel were of a different opinion. They believed that the leases were not evasions. As pointed out in our opening brief, the local office of the Administrator at no time furnished cross-appellant with either an oral or written definitive opinion, but summarily referred the case to its litigation attorneys, while both the Administrator's local office staff and cross-appellant were groping for an interpretation of the regulations.

Under these facts, is cross-appellant now to be condemned as a willful violator of a regulation that was not susceptible of a clear interpretation, because—and only because—of the opinions of Mr. Sholley and Mr. Stoneman, which cross-appellant and its counsel believed wrong?

Said the court in *Bowles v. Simon*, 145 F.(2d) 334:

> "In his brief, counsel for the Administrator says: 'These administrative rulings or interpretations are controlling.' * * * We think counsel's zeal and enthusiasm for the sanctity of such interpretations are hardly warranted. This doctrine would relegate the statutes of Congress to an inferior position unjustified even in these times when the compulsion of an emergency compels us to clothe administrative agencies with extraordinary powers.
>
> "We do not accept the Administrator's view that he may promulgate a regulation and then place on it an interpretation which becomes controlling on the courts. The Administrator has not grown to any such stature. The courts may consider his interpretations and follow them, if correct, but the court is not bound to follow them."

Citing *Norwegian Nitrogen Products Co. v. United States*, 53 S. Ct. 350; *Bowles v. Nu Way Laundry Company*, 144 F.(2d) 741.

See also *Administrator v. Southwest Hotels*, 50 F. Supp. 147, wherein the court, in excusing a violation of price ceilings, said:

> "The defendant had to learn a great deal about these regulations and the many requirements un-

der the law and regulations and made an honest and consistent attempt to comply."

2. In its Finding of Fact IV the trial court found:

"That said defendant failed and neglected to take any steps to terminate said leases and contracts until September 24, 1943. * * *"

In making such a finding, the court first assumed that the defendant could terminate the leases and contracts at will without the consent of the other parties, and a reference to the testimony will promptly disclose that upon receipt of the "clarifying amendment" of August 16, 1943, of which the cross-appellant was unable to secure a copy until August 23, 1943, counsel for cross-appellant wrote Chief Attorney Hartson requesting an interpretation, but stating:

"If the Price Administrator should take the position that the leases are an evasion, then we must, of course, request our lessors to agree to a mutual cancellation."

Cross-appellant thus very promptly announced its intention to seek a termination of the leases upon a declaration by the Price Administrator that they were evasions, and, while it continued to own and operate the markets, it did so with the sincere conviction that it was not violating the regulations. See page 17 of cross-appellant's opening brief for a fuller discussion of this finding.

3. In its Finding of Fact V the trial court found:

"That defendant neither during the life of said leases and contracts nor at any time, filed any applications with the State of Washington for any license to operate said stores, or any of them, as required by the laws of the State of Washing-

ton, nor did it pay any retail sales tax on any sales made by said stores nor make or file any returns showing any sales tax or business tax due said State from said stores as provided by the laws of the State of Washington."

Here is a finding that these retail meat markets were operating without a license and without paying sales tax or business tax. If such a finding were true, these markets would have been in serious difficulties with the State of Washington—and just how could they escape payment of the State sales tax? The concluding paragraph of each lease reads as follows:

> "It is further agreed that said meat market may, at the election of the lessee, be operated under its present name." (Tr. 18)

All markets were operated under their existing names pending the conclusion of details incident to the acquisition of the markets by the cross-appellant, including the completion of store signs, which had been ordered and were in process of manufacture (Tr. 79).

The store license and the payment of the sales and manufacturing tax were the responsibility of the managers under the contract of employment, which required such managers to:

> "manage, direct, and superintend the business of said meat market to the best of his ability, subject at all times to the direction, instructions, and control of first party." (Tr. 19)

In said Finding V the court further found:

> "That defendant never gave to any of said 25 markets any instructions as to the management or as to the books and records kept or to be kept

by said stores, and never authorized any of the obligations incurred by said markets."

This finding is entirely without support in the evidence. The contract of employment itself contains general instructions sufficient for the purpose; but as soon as the leases and contracts were concluded, cross-appellant wrote each manager a letter regarding price ceilings and wage ceilings (Tr. 76) and furnished each market with a printed form upon which to report sales (Tr. 79).

All of these managers were former owners of their respective markets and naturally familiar with operations. Their own earnings depended upon efficient management. Just what instructions the court deemed necessary in addition to the provisions of the contract, the letter with reference to price ceilings and wages and the report form is not apparent from the findings.

In Finding V the court further found:

"That the operation, management and control of said 25 markets continued in every way without change after the execution of said leases and contracts as before, except that said 25 markets were required to pay defendant a percentage of their gross sales of all meats in addition to the payment of the ceiling or maximum prices fixed by Maximum Price Regulation 169."

This finding was no doubt based on Mr. Joseph's testimony that there was no change in the operation of the stores (Tr. 111), which was emphasized by appellant in its opening brief on page 15. The question was:

"In other words, Mr. Joseph, there was no change in the operation of this store after July

the First, than before July the First, was there, as far as you know?"

Answer: "Any more than that they were supplied well with good meats."

If counsel intended the words "no change in the operation of this store" in his question to refer to ownership or management, it clearly was not so understood by Mr. Joseph, whose answer referred to the physical facts and appearance of the store operation, about which he thought counsel was inquiring, with no allusion to the change of ownership.

In Finding VIII the court found that the defendant received $19,149.64 "in excess of Maximum Price Regulation 169," when, in fact, only 57% of this amount was derived from beef, and said regulation controls only prices of beef (and veal) (Supplemental Stipulation; Tr. 21).

III.

DISCRETION OF THE TRIAL COURT

In his opening brief the Administrator argues that the defendant failed to plead

> "that its violation was neither willful nor the result of failure to take practicable precautions,"

and that the court abused its discretion in not assessing treble damages.

While such a plea would no doubt be proper where the defendant relies only on lack of willful violation and taking practicable precautions under the provisions of the amendment, these pleadings were filed prior to the amendment, and the defendant pleaded

affirmatively (and we think conclusively proved) that it made no *sales* whatever.

Cross-appellant's defense was that the Price Regulation was wholly inapplicable. These questions of pleading and of discretion were carefully considered and disposed of contrary to the Administrator's contention in *Bowles v. Krodel*, 149 F.(2d) 398, wherein it was held that the trial court, in the exercise of its discretion as conferred in the amendment (Stablization Extension Act of 1944—50 U.S.C.A. App. 925(e)), could assess the amount of the overcharge or any amount between the overcharge and overcharge trebled, even if the defendant makes no defense whatever.

In the following cases the court found the violation unintentional and absolved the defendants, to-wit:

Hecht Co. v. Bowles, 64 S. Ct. 587;

Administrator v. El Paso Iron and Metal Co., 141 F.(2d) 938;

Adminisrator v. O'Connor, 141 F.(2d) 1019;

Administrator v. Southwest Hotels, 50 F. Supp. 147.

IV.

FALSE ACCUSATIONS IN ADMINISTRATOR'S BRIEF

> The Administrator's brief is replete with charges of "willful, flagrant, deliberate and intentional violation, accompanied by fraud, concealment and dishonesty."

Such a characterization of the James Henry Packing Company's acts in this case is contemptible. The brief assumes to tell this court that the record and the evidence show fraud, but that is as far as the brief goes. It makes no analysis of—or even any reference to — any part of the record which supports such charges.

If leasing the retail markets constituted a violation of the price control act and regulations, it was certainly *unintentional.* The record conclusively establishes that neither cross-appellant nor its counsel considered the leasing an evasion. Everything that was done was of a beneficial nature. Retail markets were empty of *all* meats and failing by the score. They were unable to obtain meat because the packing plants could not process under the restrictions of the wholesale ceiling prices, there being no ceiling on livestock. Upon the conclusion of the leases, customers of the market were furnished with graded inspected meats at no increase in prices. The arrangement did not contribute to inflation; *it prevented inflation.* After an exhaustive review of the evidence, the trial court, in his decision, said:

> "This defendant, with advice of able counsel, gave thought and consideration to the regulation

without an intent to violate it, but with a desire to comply with it." (Tr. 196)

Obviously, the trial court would not concur in the character assassination written into the Administrator's brief, nor will it find approval in this court.

V.
CONCLUSION

In conclusion, may we point out that none of the following vital matters are discussed in the Administrator's brief:

First, that if there was an evasion by cross-appellant, it could only have occurred after August 16, 1943, the effective date of the amendment to the regulations, prior to which there was no regulation with reference to leasing markets;

Second, that promptly upon securing a copy of the amendment, counsel for cross-appellant wrote the Chief Attorney for the Administrator his opinion that the Henry markets were, within the purview of the amendment, wholly owned and operated by cross-appellant, and asked for an interpretation, which was never furnished;

Third, that by relinquishing all interest in retail sales of beef on September 24, 1943, cross-appellant divorced the operation entirely from Maximum Price Regulation 169, which relates only to beef;

Fourth, that only beef (no veal was handled) is involved in Price Regulation 169 and in this action; only 57% of the profits were derived from beef; therefore, 43% of the amount which the trial court saw

fit to consider an overcharge was derived from other merchandise, in nowise related to Price Regulation 169;

Fifth, that cross-appellant should not be penalized for its failure to terminate the leases and contracts in the inadequate space of time allotted, as cross-appellant was unable to do so without the consent of its lessors and managers, who were profiting from the transaction.

Respectfully submitted,

ALMON RAY SMITH,
HENRY CLAY AGNEW,
Attorneys for Appellee and Cross-Appellant.

No. 11091

United States
Circuit Court of Appeals
For the Ninth Circuit.

P. G. BATT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Idaho Southern Division

Rotary Colorprint, 661 Howard Street, San Francisco

No. 11091

United States
Circuit Court of Appeals
For the Ninth Circuit.

P. G. BATT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the District of Idaho
Southern Division

Rotary Colorprint, 661 Howard Street, San Francisco

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

W. H. LANGROISE
SAM S. GRIFFIN

Boise, Idaho

Attorneys for Appellant.

JOHN A. CARVER

United States District Attorney

E. H. CASTERLIN

Assistant United States District Attorney
Boise, Idaho

Attorneys for Appellee. [*2]

---

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the District of Idaho, Southern Division

Civil Action No. 2266

UNITED STATES OF AMERICA,

Plaintiff,

v.

P. G. BATT,

Defendant.

COMPLAINT

The United States of America, by its attorney, John A. Carver, United States Attorney for the District of Idaho, complains of the defendant, and for its cause of action alleges as follows:

1. Plaintiff, the United States of America, is and was at all times hereinafter mentioned a corporation sovereign and body politic, and brings this action under Section 3744 of the Internal Revenue Code.

2. This suit is commenced at the request of the Commissioner of Internal Revenue and by direction of the Attorney General of the United States.

3. Defendant, P. G. Batt, is a resident of Wilder, Canyon County, Idaho.

4. During the calendar year 1938, defendant had individuals in his employ to whom he paid total wages in the amount of $30,198.38. By reason of such employment, there became due and owing from the defendant for the said year 1938, excise taxes under Title IX of the Social Security Act in the amount of $681.15.

5. On January 26, 1939, defendant filed with the Collector of Internal Revenue for the Collection District of Idaho a return of excise tax for the calendar year 1938 with respect to having individuals in his employ under Title IX of the Social Security Act. In his said return, defendant reported total wages subject to tax in the amount of $22,-705.08 and tax thereon at three per cent in the amount of $681.15. Defendant paid on account of the said tax the sum of $68.11, [3] and defendant is entitled to credit against the tax for contributions paid into the unemployment funds of the State of Idaho in the amount of $41.71, leaving a balance of $571.33, no part of which has been paid.

Wherefore, plaintiff demands judgment against the defendant for the sum of $571.33, with interest and costs.

JOHN A. CARVER
United States Attorney
R. W. BECKWITH
Assistant United States
Attorney

[Endorsed]: Filed January 27, 1944. [4]

[Title of Court and Cause.]

ANSWER

Comes Now The defendant, P. G. Batt, and for an answer to plaintiff's complaint admits, denies and alleges as follows:

I.

Defendant admits the allegations contained in paragraph 1. of the plaintiff's complaint herein;

II.

Defendant admits the allegations contained in paragraph 2. of plaintiff's complaint herein;

III.

Defendant admits the allegations contained in paragraph 3. of plaintiff's complaint herein;

IV.

Defendant admits that "during the calendar year 1938, defendant had individuals in his employ to whom he paid total wages in the amount of $30,198.38," but denies each and every other allegation contained in paragraph 4. of plaintiff's complaint herein;

V.

Defendant admits all of the allegations contained in paragraph 5. of plaintiff's complaint herein, excepting that it is specifically denied there is a balance of $571.33, or any other sum due from the defendant to plaintiff, and in this connection alleges the fact to be that the employment and services for which wages were paid were exempt from the tax imposed by the terms of Title IX of the Social Security Act, in that said services were agricultural labor.

Wherefore, defendant prays that the defendant

take nothing herein, and that judgment be entered in favor of the defendant.

W. H. LANGROISE
SAM S. GRIFFIN
Attorneys for Defendant [5]

Service Of the above and foregoing Answer is hereby acknowledged, by receipt of a copy thereof, this 1st day of Feby, 1945.

JOHN A. CARVER
United States Attorney
R. W. BECKWITH
Assistant United States Attorney
Attorneys for Plaintiff

[Endorsed]: Filed February 1, 1945. [6]

[Title of Court and Cause.]

STIPULATION OF FACTS

It is stipulated and agreed between the parties to this action, through their respective attorneys, that the following facts are true and may be considered as having been given in evidence reserving to each party the right to introduce other and additional evidence;

I.

Allegations of paragraphs 1, 2 and 3 of the complaint are true.

II.

The time involved herein, and statements of facts herein, relate to the calendar year 1938 except where otherwise stated.

Statutes involved are Title IX of the Social Security Act, an Act of Congress, as it existed in 1938, and the Unemployment Compensation Law of the State of Idaho as it existed in 1938. Both acts shall be considered as having been introduced in evidence and may be referred to and used to the extent that either is relevant and pertinent.

Certified copy of Annual Return of Excise Tax for 1938 filed by P. G. Batt, the defendant, and of Assessment Certificate and portion of January 1939, Social Security Tax Assessment List, Idaho Collection District, showing [7] assessment of $68.11 against P. G. Batt, Wilder, Idaho, shall be considered as having been introduced in evidence and may be referred to and used to the extent that either is relevant and pertinent.

Defendant P. G. Batt is the same person as the applicant for refund of Idaho Unemployment Compensation taxes for the year 1938 (and other years) involved in a case decided by the Supreme Court of Idaho on March 19, 1942, reported under the name of In Re Refund of Contributions of P. G. Batt Under Unemployment Compensation Law, P. G. Batt, Appellant, v. Unemployment Compensation Division, Industrial Accident Board of Idaho, in 63 Idaho 572, 123 Pacific (2d) 1004, and the decision and opinion of said Court, and said

reports thereof, shall be considered as introduced in evidence and may be used and referred to.

The fact labor, wages, employment, business and facts involved in the decision last above referred to are identical with those involved herein.

III.

Defendant P. G. Batt was a farmer owning or farming as a tenant between 800 and 900 acres of farm lands near Homedale and Wilder, Idaho, upon which he raised potatoes, onions, lettuce, carrots and peas (and other farm crops). He also operated, seasonally, two "processing" sheds, one at Homedale and one at Wilder, in Idaho, located at trackage thereat, and off his farm lands. At such sheds he employed labor during seasons hereinafter stated, in "processing" the potatoes, onions, lettuce, carrots and peas raised upon his farms; other farm producers of similar produce employed him and his crews to "process" their produce, and paid for this service. [8]

The individuals employed, and the total wages upon which excise tax is claimed, and contributions mentioned, in paragraph 5 of the complaint, and the services of employees are in respect to the above, and hereinafter, described "processing" operations.

Approximately 25% of the produce "processed" was raised and owned by defendant, Batt; approximately 75% thereof was raised and owned by various farmers who employed Batt and such labor.

IV.

That either by reason of State or Federal statutes or regulations, or by reason of the requirements of the purchasers of the produce above mentioned, and to make the same saleable, it is necessary that as to each thereof the same be processed, graded, packed and prepared for market in the manner hereinafter set forth; that none of the produce processed by the defendant was sold directly to the ultimate consumer; that he sold all said marketable processed produce in the following manner—some to track buyers f.o.b. cars at the packing sheds, who thereupon shipped the same out of the State; that some was sold to jobbers usually on wire orders received through brokers and were shipped outside of the State and to all parts of the United States, where such jobbers broke up carload lots into smaller lots and resold to wholesalers or distributers to consumers; that the remainder was sold to what are known as car lot distributers, who bought from the applicant in car lots and themselves sold in car lots to other distributers or jobbers, and who did not sell to ultimate consumers.

Such produce was not saleable, and there was no market for it without having been processed, graded and packed as hereinafter stated, and it was not saleable in [9] bulk to ultimate consumers as, or in the condition in which, it was harvested in the fields; that the United States government would not purchase said produce for distribution on relief unless the same was so processed;

That the equipment in the operations hereinafter stated was not specialized but was available generally to farmers or could be readily procured by them, or satisfactory substitutes used, and could be, and in a number of instances were, used on the farms where the produce was produced, and that many farmers did in fact process, pack and grade, and conduct the operations hereinafter set forth on their own premises, in which event such farmers were not charged and did not pay contributions on account of the employees engaged therein; that in the section of Idaho from Twin Falls east to the vicinity of Idaho Falls, Idaho, in respect to potatoes it was common practice for the farmers of large acreage to have potato cellars either on their own premises or elsewhere, and to employ crews of men who made it their business to go from farm to farm or cellar to cellar and use their own equipment, conduct the operations hereinafter stated, and receive their compensation from the farmer and upon which compensation no contribution was or need be paid;

That in respect to peas the largest dealers in Idaho grew their own peas on owned or leased lands and processed their own produce, the processing taking place off such lands in warehouses or sheds available to tracks, performing the same operations as hereinafter stated in the case of the defendant and were not required to and did not pay any contribution with respect to the employees engaged in such operation;

V.

That aside from the produce raised by the defendant [10] the balance of such produce which was processed as hereinafter set forth was secured in the following ways:

The defendant purchased from the farmer grower that portion of his crop which was found to be marketable when and after sorted and graded. To enable defendant and the farmer to determine the part purchased and to prepare the same for market the farmer delivered such produce at the defendant's shed or warehouse, contained in half bags as taken by the farmer directly from the field as harvested.

The defendant also handled a comparatively small part of potatoes, after processing, on consignment, in which case the farmer delivered the potatoes from the field as harvested, and after the defendant had processed the same as hereinafter stated and sold the same there was deducted from the sale price the expenses, including a charge for processing and a brokerage charge, and the balance was paid to the farmer.

In the case of all produce the culls or other non-marketable produce was owned by and went back to the farmer producer or were disposed of as he directed, and did not go into market.

In the case of lettuce, peas and carrots, the defendant processed and sold that grown by him, and that which was not grown by him he handled only on consignment for the farmer owner as above.

VI.

That as to each of said products the processing operation was seasonal, largely at the time of harvesting the crop. In the case of potatoes in the district where defendant operated the harvest began about July 5th and was usually completed by September 15th. In the case of onions the season began about August 15th and continued until freezing, which was usually about November 1st, and there-
[11] upon the operation was largely ended. To a small extent some onions were stored either as purchased by the defendant or stored by the farmer in the defendant's storage or elsewhere, and when ready to ship were processed and prepared for shipment. The storage period for onions ended usually in March. Process operations on stored onions were not continuous or regular, taking place from time to time as market conditions justified and shipments were demanded, and crews or employees were picked up at the particular time as needed, used for the particular shipment, and discharged.

The harvesting, processing, packing and shipping of lettuce is highly seasonable, beginning about October 1st and ending with severe frost about November 15th, and all the operations cease with the termination of harvesting.

In the case of carrots, the season's operations run for about one month, commencing about September 15th and ending October 15th.

In the case of peas, the entire operation is during the harvest season only, which lasts about one month, usually in June.

VII.

The employees used by the defendant in processing operations, and commonly used throughout the State of Idaho therein, consist of women and men, who are not required to have any special skill. Almost any able-bodied person is capable of doing the work, and the work is largely done by transients, many employees only staying on the job for a day or two, although others continue through the particular season. Practically all growers of the produce or the farm help have the capacity or knowledge to perform any of the operations and the type of work, except as between men and women, is largely interchangeable, that is, one [12] man can perform one operation at one time and another operation at another time, and in the instances where a particular employee continues at one operation it is only in the case where there is sufficient produce going through the process to make it a more efficient operation to keep such employee at that particular work. Very frequently the person who has been employed on the farm in harvesting comes into the processing sheds and is employed in the processing operation. Frequently when smaller quantities of produce are going through the operation a single employee will perform a number of the different operations.

VIII.

The operations which took place at the defendant's sheds and which constituted "processing" as used herein, were primarily a cleaning, sorting,

grading and packing operation, and in no way changed the raw produce; they were as follows:

The produce from the defendant's farming operations and the produce of other farmers, as hereinbefore stated, were intermingled and went through the process together.

In the case of potatoes the produce arrived at the sheds covered with dirt and intermingled with clods, vines, sticks, culls, and bruised, cut, rotten and misshaped potatoes just as dug from the ground. The vines and many of the clods were picked out by hand and other dirt screened out, and then were placed in a mechanical washer partly for the purpose of precooling and partly to clean. The cooling and cleaning operation was sometimes done by spraying with hose. After being washed the produce was placed on tables where it was hand sorted and graded and the marketable portion placed in bags which were usually branded. After the sack was sewed it was trucked by hand into the [13] cars where the employees packed or stacked for shipment, and the car was iced by placing ice in bunkers at the end of each car. The potatoes which had been discarded as not marketable and refuse went back to the producer of them, and in the case where the defendant bought the marketable portion of the potatoes resulting payment was made to the producer on the basis of the marketable potatoes thus ascertained. In the case of potatoes the operation above described is frequently done by a farmer himself on his farm, or at other suitable locations,

or by travelling crews as hereinbefore stated as part of ordinary farm operations.

In the case of onions the same operation took place, except that the same were not washed.

In the case of lettuce, delivery was made by the farmer in his own truck, and the defendant's crew took over at the shed. The first operation was trimming, which consisted of cutting off the butt, clipping off surplus wrapper leaves and broken and discolored leaves, and discarding heads which were unsuitable for market. The marketable heads were then placed on a table and were divided according to size and placed in crates containing the same sized heads. During this process any other unsuitable heads were discarded. As the marketable lettuce was packed in the crates ice was placed between each layer, and the crate stamped to designate the number of heads per crate. A paper pad was put on top of the crated lettuce and ice placed over it, the paper folded across the top and the cover nailed on, and the crate then conveyed into the car and loaded, and when loaded ice was placed in the car over the tops of the crates. The employees, in addition to the above operations, prepared the ice and cleaned up the refuse, and were from time to time engaged in checking the amounts [14] received and going into cars, and disposing of culls. None of the operations were specialized, but were capable of being handled and frequently were handled by one person. The same class and type of work in the same operations are frequently done on the farms

by the producer himself and his employees as part of ordinary farming operations.

In the case of peas, delivery was made from the farm in sacks, the contents of which were dumped on a table and the unmarketable peas such as those too small, ill-shaped, broken, bruised and old, were picked out by hand, usually by women. They were not sized or graded otherwise. The remaining marketable peas were placed in hampers or tubs, and in some instances the top layers were straightened out or "faced" in order to make the hamper or tub more attractive. The hamper or tub was labeled and a cover placed on it, and then went into a tank of cold water in which it was immersed for precooling, after which it was taken into the car and loaded, and ice placed over the top for refrigeration.

In the case of carrots, the farmer producer graded and tied in bunches on the farm, placed the same in crates, and the crates were delivered to the defendant. The bunches were then washed, sized, packed and placed in cars, ice being placed in the crates and in the cars as in the case of lettuce.

From the time of the enactment of, and by reason of, the Idaho Unemployment Compensation Law and until subsequent to the year 1938 the defendant paid to the State of Idaho, under protest, contributions or taxes for and computed upon, wages for services of individuals employed in connection with the processing operations hereinbefore [15] detailed. As shown by the Return in evidence such wages were $22,705.08; the excise tax claimed by plaintiff on account thereof is $681.15; for that year, and

wages and services, defendant paid to the State of Idaho contributions in the amount of $613.04, leaving a balance of $68.11 which defendant paid to, and which was received by, plaintiff on January 26, 1939.

In 1941 defendant, pursuant to provisions therefor in the above referred to Idaho law, applied to the Industrial Accident Board of Idaho, for a refund of all contributions paid to the State of Idaho by defendant under such Idaho law on account of such services and wages since enactment of such law to and including a portion of the year 1941 (and including the year 1938, the year in controversy herein.) The ground for refund was that the services were, and the wages were for, "agricultural labor" and therefore under the Idaho law excepted from tax or contributions on account thereof. The proceedings for refund resulted in the decision and opinion of the Supreme Court herein referred to and in evidence, and after and as result of such decision refund was made by the State of Idaho for a period of three years preceding the application for refund, and included therein were contributions paid for the year 1938 in the amount of $571.10.

Dated this 1st day of Feby, 1945.

JOHN A. CARVER
United States Attorney
R. W. BECKWITH
Assistant United States Attorney
Attorneys for Plaintiff
W. H. LANGROISE
SAM S. GRIFFIN
Attorneys for Defendant

[Endorsed]: Filed February 9, 1945. [16]

[Title of Court and Cause.]

OPINION

Filed March 15, 1945

John A. Carver, United States District Attorney, E. H. Casterlin, and R. W. Beckwith, Assistants, Boise, Idaho. Attorneys for the Plaintiff.

William L. Langroise and S. S. Griffin, Boise, Ida., Attorneys for the Defendant.

March 15th, 1945

Cavanah, District Judge.

The nature of the suit is on wherein the United States seeks to recover the sum of $571.33 as an excise tax for the calendar year 1938, with respect to individuals in the defendant's employ, under Title 9 of the Social Security Act, as then existed.

The defendant answers and alleges that the employment and services, for which wages were paid, were exempt under the Act from the tax imposed, in that the services were "Agricultural Labor".

The facts are stipulated, and the crucial question to be considered is: Does the Act and facts recognize the interpretation that the services rendered come under the exempt provisions of the Act, and in determining this issue the particular facts of each case must be considered, in order to [19] ascertain what was the intention of Congress in exempting from the operation of the Act "Agricultural Labor".

The plaintiff contends that the services rendered were of a commercial character, in the field of industry, and not true "Agricultural Labor", while the defendant asserts that the term "Agricultural Labor" must be given a meaning wide enough to include agricultural labor of any kind, as generally understood throughout the United States, in connection with the cultivation of the soil, raising and harvesting crops, including to a variable extent the preparation of the products for consumption, which "processing" is necessary for disposal, by marketing or otherwise.

What then is a fair analysis of the facts here? It requires a consideration of the nature of the activities of defendant, who was a farmer owning, or operating as a tenant, between eight and nine hundred acres of farm land, near Homedale, and Wilder, Idaho, upon which he raised potatoes,

onions, lettuce, carrots, peas, and other farm products. He also operated, seasonally, two "processing" sheds, one at Homedale and one at Wilder, located at trackage thereat, and off his farm land. At such sheds he employed labor, during seasons, in "processing" potatoes, onions, lettuce, carrots and peas, raised upon his farms, and other farm producers of similar produce employed him, and his crew, to "process", grade, pack and prepare for market, their produce, and paid for that service.

The individuals, upon whose wages the excise tax is claimed, the contributions made, were employed in processing, grading, packing and preparing for market operations. Approximately 25% of the produce so "processed", graded, packed and prepared for market, was raised and owned by the defendant, and 75% thereof was raised and owned by various farmers, who employed defendant and such labor.

It appears necessary, by reason of Federal and State [20] statutes, and the requirements of the purchasers of produce, to make such produce salable, that each thereof be processed, graded, packed and prepared for market in the manner herein referred to. None of the produce, so handled and processed by the defendant, aws sold directly to the ultimate consumer, as he sold all marketable processed produce to track buyers, F.O.B. cars at the packing sheds, who thereupon shipped the same out of the state. Some were sold to jobbers, usually on wire orders received through brokers, and shipped to all parts of the United States, where such jobbers

broke up carload lots into smaller lots, and resold to wholesale or retail distributors, and through them to the ultimate consumers; the remainder was sold to what is known as car-lot distributors or jobbers, who did not sell to the ultimate consumers. Such produce was not salable, and there was no market for it, without having been so processed, graded, packed and prepared for market, and was not salable in bulk to the ultimate consumers in the condition in which it was in the field, and the United States Government would not purchase the produce, for distribution on relief, unless it was processed.

The equipment employed in the operations was not specialized, but was available generally to farmers, and used on the farms where the produce was produced, and many farmers conducted the operation of processing, packing and grading, etc., on their own premises, in which event the farmers were not charged, and did not pay, contributions on account of the employees engaged therein.

In the section of Idaho, from Twin Falls east to the vicinity of Idaho Falls, Idaho, in respect to potatoes, it was the common practice for the farmers of large acreage to have potato cellars, either on their own premises or elsewhere, and to employ crews of men, who made it their business to go from farm to farm, or cellar to cellar, and use their own equipment, conduct [21] the operations, and receive their compensation from the farmers, upon which compensation no contribution was or need be paid.

In respect to peas, the largest dealers in Idaho grew their own peas, on owned or leased land, and processed their own produce, the processing taking place off such land, in warehouses or sheds available to the tracks, performing the same operation as the defendant, but were not required to and did not pay any contribution with respect to employees engaged in such operations.

Aside from the produce raised by the defendant, the balance of such produce processed was that which the defendant purchased from the farmer-grower and found to be marketable after sorting and grading. The farmers delivered the produce at defendant's sheds, or warehouses, in half bags, as taken by them directly from the field, to enable the defendant and the farmers to determine the part to be purchased and prepared for market. As to potatoes, after they were processed, graded, packed and prepared for market, on consignment, and after the sale, the defendant, in case the farmer delivered the potatoes from the field, deducted the expenses from the sale price, including the charge for processing, grading, packing, and preparing for market, and a brokerage charge, and the balance was paid to the farmer. As to all the produce, the culls or other non-marketable portions thereof, went back to the farmer producer, or was disposed of as he directed, but did not go into the market.

In the case of peas, lettuce, and carrots, the defendant processed and sold that grown by him, and that which was not grown by him, he handled on consignment for the farmer-owner.

As to each of the products the processing operation was seasonal, at the time of harvesting the crops. In the district where the defendant operated, the harvest began about July 15th and was completed by September 15th. The processing, etc. [22] season as to onions began about August 15th, and continued until freezing, about November 1st, when the operation ended. To a small extent some onions were stored, either as purchased by the defendant or stored by the farmers, in the defendant's storage or elsewhere, and when ready to ship were processed and prepared for shipmnt. The storage period for onions ended in March. Processing operations on stored onions were not continuous or regular, taking place from time to time as market conditions justified and shipments were demanded, and crews of employees were picked up at the particular time as needed and then discharged.

All operations as to the harvesting, processing, packing, grading and shipping of lettuce are highly seasonal, beginning about October 1st and ending with severe frost about November 1st, and then they ceased.

In the case of carrots, the season's operations run for about one month, from September 15th to October 15th, and as to peas last one month, in June.

The work of employees, in the processing operations as commonly used in the state, did not require any special skill, and the work is largely done by transients, many only staying on the job for a day or two, although others may continue through the

particular season. Practically all of the growers of the produce, or the farm help, have the capacity or knowledge to perform any of the operations and type of work. Frequently the person who has been employed on the farm, in harvesting, comes into the processing sheds and is employed in the processing operation, and frequently a single employee would perform a number of different operations.

The operations which took place at the defendant's sheds, and which constituted "processing", were primarily cleaning, sorting, grading, and packing. The produce of the defendants' farming operations, and the produce of other farmers, were [23] intermingled, and went through the processing, packing, grading and preparing for market, together.

The potatoes would be delivered at the sheds, covered with dirt and intermingled with clods, vines, sticks, culls, and some bruised, cut, rotten and misshaped, just as dug from the ground. The vines and many of the clods were picked out by hand and other dirt screened out, and then were placed in a mechanical washer, partly for the purpose of precooling and partly to clean, and sometimes done by spraying with a hose. After being washed, the produce was placed on tables, where it was hand-sorted, graded and the marketable portion placed in bags and usually branded. After the sacks were sewed they were trucked by hand into the cars, where they were packed and stacked for shipment, and the cars iced. The potatoes discarded or refused went back to the producer, and where the de-

fendant bought the marketable portion, payment was made to the producer on the basis of the marketable portion ascertained.

In case of potatoes, the operation was sometimes done by the farmer himself on his farm, or at other suitable locations, or by traveling crews as part of ordinary farm operations. In case of onions, the same operation took place, except they were not washed. In case of lettuce, delivery was made by the farmer in his own truck, and defendant's crew took over at the shed, where the lettuce was trimmed, and the marketable heads were placed on a table and divided according to size and placed in crates with ice and stamped. The employees also prepared the ice, cleaned up the refuse and checked the amounts. In case of peas, delivery was made from the farm in sacks, contents were placed on a table and sorted, and then placed in hampers or tubs, which were labeled, and, after being placed in a tank of cold water, were taken into the car, and ice placed over the top for refrigeration. In case of carrots, they were tied in bunches on [24] the farm by the farmer producer, placed in crates and then delivered to the defendant, who then washed, sized, packed, and iced them, as was done with lettuce, and placed in cars.

Since the enactment of the Idaho Unemployment Compensation Law, and subsequent to the year 1938, the defendant here paid to the State of Idaho, under protest, contributions or taxes, computed upon wages for services of individuals employed in

connection with the processing operations, etc., here referred to, in the amount of $22,705.00, and the excise tax claimed by plaintiff on account thereof was $681.15, for 1938, and the defendant paid to the State of Idaho the sum of $613.04, leaving a balance of $68.11, which defendant paid to and was received by plaintiff. Thereafter, defendant here applied to the Industrial Accident Board of the state for a refund of all contributions paid, on the ground that the services and wages were "Agricultural Labor", and exempt under the Idaho law. Proceedings were had in the State Court, wherein the defendant was granted a refund of $571.33, as decided by the Supreme Court of the State of Idaho. (P. G. Batt, Appellant, v. Unemployment Compensation Division, Industrial Accident Board of Idaho, 63 Idaho 572, 123 Pac (2) 1004.)

We are therefore confronted with the specific problem as to what activities are involved here, as disclosed by the facts, in determining whether they come under the interpretation and meaning of the term "Agricultural Labor", as defined by the Ninth Circuit Court of Appeals, for it will be observed that the question has been decided by that Court on several occasions in similar situations, in the cases of North Whittier Heights Citrus Association v. National Labor Relations Board, 109 Fed. (2) 76, and Idaho Potato Growers v. National Labor Relations Board, 144 Fed. (2) 295. In the North Whittier Heights case the Court held that the activity in treating or processing of raw products, and marketing them, enters upon the status of "in-

dustry". In that [25] case the petitioner was a corporate body, consisting of farmers, an organized non-profit cooperative corporation, under the law, with a membership of about 200 citrus fruit growers, and engaged in receiving, handling, washing, grading, packing and shipping fruit of its members to market. The Court said:

"Industrial activity commonly means the treatment or processing of raw products in factories. When the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing it has entered upon the status of 'industry' ".

* * * * * *

"So to be agricultural labor, the work need not be strictly related to the crop, and every work related strictly to the crop is not of necessity agricultural labor and those doing it agricultural laborers."

* * * * * *

"The opinion in the case of Pinnacle Packing Co. v. State Unemployment Commission, supra, a case arising under a cooperative arrangement for processing and marekting fruit, contains some apt language. We quote: 'The fruit growers who are engaged in the care, cultivation, picking, and delivery of the products of the orchard to be processed, graded, packed and marketed are engaged in agricultural labor and are exempt from the provisions of the statute. As soon as the fruit is delivered by the growers to the plaintiff for processing, grading,

packing and marketing, then the exemption ceases. The plaintiffs engaged in processing, grading, and packing and marketing the fruits are engaged in industry and are, therefore, subject to the provisions of the Act and are not exempt as being engaged in agricultural labor.'

"We conclude that the workers in petitioner's packing house are not agricultural laborers and are therefore not exempt from the operation of the Act."

The conclusion reached by the Court in the North Whittier case was adhered to in the recent Idaho Potato Grower case, as the Court held the laborers occupy a similar status.

When we come to consider the status of the growers and the defendant here, as compared with the status of the parties, similarly situated, in the cases decided by the Ninth Circuit Court of Appeals, we find them to be materially the same, and the fact that the grower in the present case operates through the defendant as an individual, and not as a corporation, is not an essential difference; therefore, the conclusion here reached is that the services rendered were of a commercial nature, and an industrial activity, which takes them out of the "Agricultural Labor" exemption provided in the Act.

[26]

Attention is called to the decision in the case of Stuart v. Kleak, 129 Fed. (2) 400, the facts of which show that the type of work performed was confined exclusively to work upon the farm, and not

dustry". In that [25] case the petitioner was a corporate body, consisting of farmers, an organized non-profit cooperative corporation, under the law, with a membership of about 200 citrus fruit growers, and engaged in receiving, handling, washing, grading, packing and shipping fruit of its members to market. The Court said:

"Industrial activity commonly means the treatment or processing of raw products in factories. When the product of the soil leaves the farmer, as such, and enters a factory for processing and marketing it has entered upon the status of 'industry' ".

* * * * * *

"So to be agricultural labor, the work need not be strictly related to the crop, and every work related strictly to the crop is not of necessity agricultural labor and those doing it agricultural laborers."

* * * * * *

"The opinion in the case of Pinnacle Packing Co. v. State Unemployment Commission, supra, a case arising under a cooperative arrangement for processing and marekting fruit, contains some apt language. We quote: 'The fruit growers who are engaged in the care, cultivation, picking, and delivery of the products of the orchard to be processed, graded, packed and marketed are engaged in agricultural labor and are exempt from the provisions of the statute. As soon as the fruit is delivered by the growers to the plaintiff for processing, grading,

packing and marketing, then the exemption ceases. The plaintiffs engaged in processing, grading, and packing and marketing the fruits are engaged in industry and are, therefore, subject to the provisions of the Act and are not exempt as being engaged in agricultural labor.'

"We conclude that the workers in petitioner's packing house are not agricultural laborers and are therefore not exempt from the operation of the Act."

The conclusion reached by the Court in the North Whittier case was adhered to in the recent Idaho Potato Grower case, as the Court held the laborers occupy a similar status.

When we come to consider the status of the growers and the defendant here, as compared with the status of the parties, similarly situated, in the cases decided by the Ninth Circuit Court of Appeals, we find them to be materially the same, and the fact that the grower in the present case operates through the defendant as an individual, and not as a corporation, is not an essential difference; therefore, the conclusion here reached is that the services rendered were of a commercial nature, and an industrial activity, which takes them out of the "Agricultural Labor" exemption provided in the Act.

[26]

Attention is called to the decision in the case of Stuart v. Kleak, 129 Fed. (2) 400, the facts of which show that the type of work performed was confined exclusively to work upon the farm, and not

in processing or marketing the crops raised thereon, and therefore, the facts are not similar to those in the present case.

In 1941 Congress enacted an Act (42 U.S.C.A. Subdivision 1, 4 of Section 409) broadening the term "Agricultural Labor" to now include "(4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market * * * ", which does not apply to the present cause of action, but shows a recognition by Congress of the situation then existing, and the necessity for the remedial legislation, which it passed.

When we come to consider the further contention of the defendant that the Supreme Court of Idaho has held that such services and work were exempt under the Idaho Unemployment Compensation Law, in defining "Agricultural Labor", we find that the decision of the State Court is not binding upon the Federal Court, when an interpretation of the Federal Act is involved, and as the Ninth Circuit Court of Appeals has taken a different view, that is the law in this Circuit.

From what has been said, findings and judgment, in conformity with the conclusion here reached, will be entered, granting to the plaintiff judgment

against the defendant in the sum of $571.33, with interest and costs. [27]

[Title of Court and Cause.]

OPINION

Filed March 30, 1945

John A. Carver, United States District Attorney, E. H. Casterlin, and R. W. Beckwith, Assistants, Boise, Idaho. Attorneys for the Plaintiff.

William L. Langroise and S. S. Griffin, Boise, Ida., Attorneys for the Defendant.

March 30, 1945.

Cavanah, District Judge.

The defendant presents a petition for reconsideration and urges that the court eliminate consideration of "commercial" or "industry" and examine the "type of labor", and when done so as to farmers processing in Idaho, an essential agricultural activity under the stipulation of facts in preparation of vegetables for man's use and in their disposal by marketing or otherwise is exempt.

In the original opinion the court endeavored to relate fully the material facts, for it realized that the particular facts of each case must be separately considered in order to ascertain what is true "agricultural labor", for that is the [28] specific issue here under both the Social Security Act and the National Labor Relations Act.

The services here rendered in connection with farm products related to and extended beyond be-being engaged in the care, cultivation, picking, delivery of the products of the growers to be processed, graded and packed for market, for it is repeatedly stated in the stipulation of facts that the produce of both the defendant (and other growers which were intermingled), were, after being harvested, taken and delivered to the defendant at his warehouses or processing sheds in bags and trucks, and were taken by them directly from the field to enable the defendant and the growers to determine the part to be purchased and prepared for market. The handling of the produce from then on was by the defendant, who in some instances stored some of the produce, either as purchased by him or stored by the growers in the defendant's storage. The defendant bought the marketable portion and payment was made to the purchaser on the basis of the marketable portion and price ascertained. All expenses incurred, as labor or otherwise, in connection with handling the produce after it was delivered to the defendant by the growers, such as checking, keeping account of the amounts of sale prices, remitting to the growers, grading, packing, placing and packing on the cars and brokerage charges were deducted from the sale price. Some of the produce not bought by the defendant or not grown by him he handled on consignment. After the produce was processed, it was hand stored, graded, and the marketable portion placed

in bags and branded, and after the sacks were sewed they were trucked by hand into the cars where they were packed and stacked for shipment, and the cars iced. It appears that from the time that the growers delivered their produce to the defendant at his warehouses, they did nothing else in the handling of it and [29] were paid the sale price by the defendant after all expenses incurred in connection with the disposal and care of the produce by the defendant. The portion produced by the defendant was taken care of, and the same kind of services rendered as to the produce of other growers. Sometimes sales were made at the warehouses by the defendant and placed into cars on tracks alongside the warehouses. These are some of the specific activities of the defendant, and after considering them with other activities appearing in the facts, one is forced to the conclusion that from the time farm produce is delivered to the defendant and processed, agricultural labor ceases, and the activities of the defendant from then on are of a commercial character and enter the field of industry.

As stated in the original opinion of the court, the interpretation given to the term "agricultural labor" by the Ninth Circuit Court of Appeals is applicable to the facts in the present case, and when taken together with the kind of services rendered here and upon which the tax is levied, are of a commercial character and in the field of industrial activity and not exempt from the operation of the Act.

The petition for a reconsideration of the case is denied. Findings and decree will be filed and entered as stated in the original opinion. [30]

[Title of Court and Cause.]

FINDINGS AND CONCLUSIONS

This Cause, Having come on regularly for hearing, the court now enters its Findings of Fact and Conclusions of Law, as follows:

FINDINGS OF FACT

I.

That during the calendar year, 1938, the defendant, P. G. Batt, had individuals in his employ to whom he paid total wages in the amount of $30,198.38.

II.

That on January 26, 1939, the defendant filed with the collector of Internal Revenue for the collection district of Idaho, a return of excise tax for the calendar year, 1938, with respect to having individuals in his employ under Title 9 of the Social Security Act.

III.

That of the total amount of $30,198.38, so paid as wages, and reported the sum of $22,705.08 was paid as wages for services which were not agricultural labor, but were of a commercial character and in the field of industrial activity and were per-

formed within the United States by an employee for his employer and covered by provisions of Title 9 of the Social Security Act (49 Stats. 639; 42 USC 1101 et seq.); [31]

IV.

That the sum of $22,705.08 is subject to the tax thereon at the rate of 3% in the amount of $681.15;

V.

That the defendant paid the sum of $68.11 on January 26, 1939, on account of said tax, and the defendant is entitled to credit against the tax for contributions paid into the unemployment funds of the State of Idaho in the sum of $41.71, leaving a balance of $571.33 unpaid and owing to the United States of America as of January 26, 1939.

CONCLUSIONS OF LAW

I.

That the United States of America is entitled to a judgment against the defendant, P. G. Batt, for the sum of $571.33, together with interest thereon at the rate of 6% per annum, from January 26, 1939, together with its costs and disbursements incurred herein.

Let Judgment be entered accordingly.

Dated This 6th day of April, 1945.

CHARLES C. CAVANAH
District Judge. [32]

[Endorsed]: Filed April 6, 1945.

In the District Court of the United States, in and for the District of Idaho, Southern Division

No. 2266

UNITED STATES OF AMERICA,

Plaintiff,

vs.

P. G. BATT,

Defendant.

JUDGMENT

This Cause, Having come on regularly for hearing and Findings of Fact and Conclusions of Law in writing having been made and entered herein,

Now, Therefore, It Is Ordered, Adjudged and Decreed, That the United States of America, plaintiff, does have and recover from P. G. Batt, defendant, the sum of $782.72, together with its costs and disbursement assessed in the sum of $14.46.

Dated This 6th day of April, 1945.

CHARLES C. CAVANAH
District Judge.

[Endorsed]: Filed April 6, 1945. [33]

[Title of Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given, That P. G. Batt, defendant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth

Circuit from the final judgment in this action dated and entered the 6th day of April, 1945.

Dated, June 20th, 1945.

SAM S. GRIFFIN
W. H. LANGROISE

[Endorsed]: Filed June 20, 1945. [34]

[Title of Court and Cause.]

CERTIFICATE OF CLERK OF UNITED STATES DISTRICT COURT TO TRANSCRIPT OF RECORD

United States of America,
District of Idaho—ss.

I, Ed. M. Bryan, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 37, inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellant, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of $7.10, and that the same have been paid in full by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 2nd day of July, 1945.

[Seal] ED. M. BRYAN
Clerk. [38]

[Endorsed]: No. 11091. United States Circuit Court of Appeals for the Ninth Circuit. P. G. Batt, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Southern Division.

Filed July 5, 1945.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the U. S. Circuit Court of Appeals
for the Ninth Circuit

No. 11091

P. G. BATT,

Appellant

vs.

UNITED STATES OF AMERICA

Appellee

APPELLANT'S STATEMENT OF POINTS; AND STIPULATION FOR RECORD: UNDER RULE 19 CCA.

Pursuant to Rule 19 (6) of the Rules of the above Court, the appellant states the points upon which he intends to rely on the appeal as follows:

1. That the services of individuals in appellant's employment were, and the wages paid such individuals were for services in, agricultural employment, and were not subject to excise tax, but were excepted therefrom by Title 9 of the Social Security Act.

2. The trial court erred in

(a) Finding III that the services "were not agricultural labor, were of a commercial nature and in the field of industrial activity".

(b) Finding III that the services "were * * * covered by, and not exempt from the provisions of Title 9 of the Social Security Act (49 Stat. 639; 42 USC 1101 et seq.)"

(c) Finding IV that the sum of $22,705.08 is subject to tax thereon at the rate of 3% in the amount of $681.15.

(d) Finding V that "a balance of $571.33 (is) unpaid and owing to the United States of America as of January 26, 1939.

(e) Conclusions of Law I that the United States of America is entitled to a judgment against the defendant, P. G. Batt, for the sum of $571.33, together with interest thereon at the rate of 6% per annum from January 26, 1939 together with its costs and disbursements incurred.

Each of which is contrary to, and unsupported by, the evidence (Stipulation of Facts), and contrary to law, in that the services of individuals involved, and on account of whose wages tax is sought, were agricultural labor, and excepted from taxable services and wages by the statute; and contrary to and unsupported by the Court's opinion of March 30, 1945 to the effect that the services were processing services and ceased to be agricultural labor after processing, and only thereafter the activities of defendant were of a commercial character and entered the field of industry.

3. The trial court erred in entering judgment against defendant for any sum.

4. The trial court erred in not finding and concluding from the facts and law that the services and wages were in agricultural labor, and excepted from the tax; that no tax was payable; that judgment should be for defendant.

SAM S. GRIFFIN
W. H. LANGROISE
Attorneys for Appellant
Residence, Boise, Idaho.

DESIGNATION

The appellant and appellee, by their respective attorneys, stipulate the parts of the record which they think necessary for the consideration of the foregoing points, as follows:

1. Complaint (Record pp. 3-4)
2. Answer (Record p. 5)
3. Stipulation of Facts (Record pp. 7-16)
4. Opinion of District Court, March 15, 1945 (Record pp. 19-27)
5. Opinion of District Court, March 30, 1945 (Record pp. 28-30)
6. Findings and Conclusions (Record pp. 31-32)
7. Judgment, April 6, 1945 (Record p. 33)

SAM S. GRIFFIN
W. H. LANGROISE
Attorneys for Appellant
JOHN A. CARVER
United States District Attorney
E. H. CASTERLIN
Ass't. U. S. District Attorney
Attorneys for Appellee.

[Endorsed]: Filed Jul. 13, 1945. Paul P. O'Brien, Clerk.

No. 11091

United States
Circuit Court of Appeals
For the Ninth Circuit

P. G. BATT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

On Appeal from the United States District Court for the District of Idaho, Southern Division

HONORABLE CHARLES C. CAVANAH, *Judge*

SAM S. GRIFFIN
WILLIAM H. LANGROISE,
Boise, Idaho,
Attorneys for Appellant.

JOHN A. CARVER,
United States District Attorney,
E. H. CASTERLIN,
Assistant United States District Attorney,
Boise, Idaho,
Attorneys for Appellee

United States
Circuit Court of Appeals
For the Ninth Circuit

P. G. BATT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

On Appeal from the United States District Court for the District of Idaho, Southern Division

HONORABLE CHARLES C. CAVANAH, *Judge*

SAM S. GRIFFIN
WILLIAM H. LANGROISE,
Boise, Idaho,
Attorneys for Appellant.

JOHN A. CARVER,
United States District Attorney,
E. H. CASTERLIN,
Assistant United States District Attorney,
Boise, Idaho,
Attorneys for Appellee

.....Clerk

Filed .....

SUBJECT INDEX

TABLE OF CASES AND STATUTES

United States

Circuit Court of Appeals

For the Ninth Circuit

P. G. BATT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

JURISDICTION

This is an action instituted by the United States, appellee, against P. G. Batt, a resident of Idaho, under Section 3744 Internal Revenue Code (Sec. 3744, Title 26, U. S. C.) for the recovery of excise taxes for the year 1938 alleged to be payable and due for unemployment compensation under Title IX of the Social Security Act (Secs. 1100 et seq. Title 42; Secs. 1600 et seq., Title 26; U. S. C.) (Record pp. 2-3).

Jurisdiction of the District Court is founded upon Secs. 41 (1) (5), 105, 112, Title 28; Sec. 3744, Title 26, U. S. C.

Jurisdiction of this court is sustained under Sec. 225, Title 28, U. S. C.

Judgment in favor of the United States was entered April 6, 1945; notice of appeal was filed June 20, 1945 (Record, p. 34); record certified July 2, 1945, and filed in this court July 5, 1945 (Record, p. 36); Statement and Designation was filed July 13, 1945 (Record, p. 39).

STATEMENT OF THE CASE

In 1938, the Federal Social Security Act, Title IX (Sec. 901, 49 Stat. 639; Sec. 1101, Title 42 U. S. C.) imposed upon employers an excise tax of 3% of total wages payable by him with respect to employment. Against this the employer was allowed a credit, not exceeding 90% of the Federal tax, for amounts (contributions) paid by him with respect to employment into an Unemployment fund under a state law (Sec. 902, idem; Sec. 1102, idem). The State fund was deposited with the United States Treasurer and by the latter repaid upon requisitions of the State (Secs. 903, 904 idem; Secs. 1103, 1104 idem).

The United States made, and makes, no payment of benefits to unemployed employees.

The State alone makes payments of benefits to unemployed, by virtue of a law therefore passed by the State, if approved by the Federal Social Security board. (Sec. 903 idem; Sec. 1103 idem).

Since in 1938 the Federal tax was payable only "with respect to employment (as defined in Section 907 of this chapter)" and said section 907 defined "employment" as

> "any service, of whatever nature, performed within the United States by an employee for his employer, *except* (1) *Agricultural labor;* * *"

there was not imposed any Federal tax upon wages paid by an employer to employees performing agricultural labor. The act contained no definition of agricultural labor. The act gave the Commissioner of Internal Revenue power to make rules and regulations "for the enforcement" of the Act, but none for the interpretation, or to make definitions or determinations of what was or was not agricultural labor (Sec. 908 idem; Sec. 1108 idem). So also the Secretary of the Treasury, Secretary of Labor and Social Security Board (Sec. 1102 idem; Sec. 1302 idem).

The State of Idaho, under the urgent necessity imposed by the Federal law, and in order to secure benefits thereunder for its workmen, who otherwise would secure nothing and whose employers would be otherwise federally taxed without any return of benefits to such workmen, adopted an Unemployment Compensation Law (Sec. 2 (b) Chap. 12, 3d Extra Session of 23d Session, 1936, Idaho Legislature) providing for payment of unemployment benefits to workmen and for an excise tax upon employers (in 1938) of 2.7% of

> "wages payable by him with respect of employment as defined in this act" (Sec. 7, Chap. 183, 1937 Idaho Session Laws, p. 304)

and "employment" was defined as meaning

> "(g) * * service * performed for wages * * (6) The term 'employment' shall not include— * * (D) Agricultural labor * *" (Sec. 19 (g) (6), Chap. 187, 1937 Idaho Session Laws, pp. 316-318).

The appellant, Batt, for the year 1938 paid the State tax of $613.04 under protest to the State on account of wages in the amount of $22,705.08 paid his workmen for services of the character hereinafter set forth and which he claimed to be agricultural labor; the Federal tax thereon was $681.15; the amount paid the State was credited, leaving due the Federal government $68.11 which appellant paid January 26, 1939. In 1941, pursuant to the State law, appellant applied for a refund of the State tax, and after proceedings therein resulting in the opinion and order of the Supreme Court of Idaho reported as Batt v. Unemployment Comp. Div. in 63 Idaho 572, 123 Pac. (2) 1004, whereby such court held the services to have been agricultural labor and not subject to tax, refund of the State tax to the extent of $571.33 was made (Record, pp. 6-7, 15-16).

Thereafter this suit was commenced by the United States to recover its alleged entire tax of $681.15, less $68.11 originally paid, and without State tax credit, except for $41.71 not refunded by the State (Record, pp. 2-3). The appellant denied liability to tax inasmuch as the services for which

wages were paid were agricultural labor (Record, pp. 3-5).

The sole basic question is whether or not the services were agricultural labor within the term used by the Federal statute. They have been found to be agricultural labor within the same term used in the inter-dependent and cooperating State statute, involving the identical employer and services.

There is no dispute of fact. The facts are stipulated (Record, pp. 5-16).

Appellant Batt was an Idaho farmer, in 1938 operating about 900 acres of farm lands upon which he raised potatoes, onions, lettuce, carrots and peas (and other farm crops) (Record, pp. 6, 7).

During a short season of the year (varying according to produce from one to two months in late summer—Record, p. 11) Batt operated two "processing" sheds on trackage off his farms for the "processing" of his own farm produce, employing the labor and services and paying the wages therein which are alone the subject of the alleged tax sought to be recovered by the United States herein (Record, p. 7).

Other farmer producers of similar produce employed Batt, such laborers and facilities, to "process" their produce and paid for this service (Record, p. 7). In 1938, 25% of the produce "processed" was raised and owned by Batt, and 75% raised and owned by other farmers who employed Batt and such labor. All produce, marketable and unmarketable and culls, continued to belong to the original producer thereof throughout "processing" and after

"processing" was completely finished and until the producer himself sold it; the marketable portions, ascertained by "processing", were thereafter sold by the producer thereof, sometimes (in case of potatoes) to Batt, as a buyer, sometimes (in the case of potatoes and always in case of lettuce, peas and carrots) to others on consignment, Batt acting as selling or consigning agent of the producer; culls or other unmarketable produce were owned by and went back to the farmer producer, or were disposed of as he directed and did not go into market (Record, pp. 7, 10).

"Processing" is a cleaning, sorting, grading and packing operation in no way changing the raw produce (Record, pp. 12-13) and is a statutory, regulatory and practical essential incident to production and disposition by the producer of the produce herein involved, i.e., potatoes, onions, lettuce, carrots and peas (Record, p. 8). Many farmers, particularly the ones engaged in large operations, process as ordinary farm operations their own production on or off their premises, by their own employees or by professional travelling crews engaged in that business, using equipment owned by the crew, and in neither case did the United States require payment of the tax (Record, pp. 9, 13-14). But the United States does seek to impose the tax upon Batt herein, both in connection with processing his own production (25%) and in connection with processing the production of others.

No specialized equipment, or equipment not generally available to farmers, is required (Record, p. 9) and labor is unskilled, and largely transient and temporary (Record, p. 12).

Processing, in the case of potatoes, consists of taking out dirt, vines, culls, washing and pre-cooling, sorting, grading, and placing the part found marketable in bags, loading and icing (Record, p. 13); in the case of onions the same, except washing (Record, p. 14); in the case of lettuce, cutting off the butt, clipping surplus wrapper, broken and discolored leaves, discarding unsuitable heads, sizing marketable heads, crating, icing and loading (Record p. 14-15); in the case of peas, discarding unmarketable portions, packing, pre-cooling, loading and icing (Record p. 15); in the case of carrots, washing, sizing, packing, loading and icing bunches (Record, p. 15).

The trial court's initial opinion (Record pp. 17-29) after repeating the stipulation of facts, shows that the Court (Record, pp. 25-29) excluded the services from agricultural labor, and made them subject to tax, wholly on the basis of this Court's decisions in the North Whittier Heights Citrus Association case (109 Fed (2) 76) and the Idaho Potato Growers case (144 Fed (2) 295) both of which were interpretations of the National Labor Relations Act, and not at all interpreting the Social Security Act, the purposes and phraseology of which are distinctly different, and which, as the first named Act does not, requires for the accomplish-

ment of its purposes in any State an interpretation corresponding to the interpretation given identical words used in the essential auxiliary State statute. The trial court's second opinion (Record pp. 29-32) shows the same (Record p. 31) and that the court ignored the type of labor as a factor, and gave consideration only to its alleged commercial or industrial aspect (Record, pp. 29, 31); it likewise brushed aside the fact that identical labor is agricultural in Idaho within the meaning of the auxiliary Idaho State statute (Record, p. 28); it likewise ignored the fact stipulated that 25% of the produce processed was Batt's own farm production, not taxable nor taxed in cases of other farmers and so stipulated (Record, p. 9); and accordingly found (Finding III, Record, p. 32) solely because the services "were of a commercial character and in the field of industrial activity," and adjudged that all such services (including that upon Batt's own produce) were taxable and the whole tax recoverable (Record, pp. 33, 34).

SPECIFICATIONS OF ERROR

The trial court erred:

1

In finding (Finding III, Record, p. 32) contrary to the facts and law that the services were not agricultural labor, but were of a commercial character and in the field of industrial activity.

II

In finding (Finding III, Record, p. 33) contrary to the facts and law that the services were covered by provisions of Title 9 of the Social Security Act (49 Stat. 639; 42 U. S. C. 1101 et seq.).

III

In finding (Finding IV, Record, p. 33) contrary to the facts and law that $22,705.08 of wages paid were subject to the tax.

IV

In finding (Finding V, Record, p. 33) contrary to the facts and law that a balance of $571.33 is unpaid and owing to the United States as of January 26, 1939.

V

In concluding (Conclusions I, Record, p. 33) contrary to the facts and law, that the United States was entitled to judgment against appellant in the sum of $571.33 together with interest and costs.

VI

In failing to find, conclude and adjudge that the service rendered upon Batt's produce was agricultural labor.

VII

In failing to find, conclude and adjudge in accord with the facts and law that all services were agricultural labor, excepted from tax; that no tax was

payable or due; that judgment be entered for defendant.

ARGUMENT

The United States seeks the recovery of the tax and necessarily asserts that the services were taxable, that is, that they were not "agricultural labor." If they, or any distinguishable part, were agricultural labor, either no tax at all, or at least none with respect to the distinguishable part, was payable or collectible because the Social Security Act specifically excepted such labor (without definition) from tax by excepting it from the definition of employment, i.e.

> "any service, of whatever nature * * by an employee for his employer, except (1) Agricultural labor * *"
>
> Sec. 907, 49 Stat. 639, 42 USC 1107.

The one question then is the "type of work" that was being done; the answer is to no extent dependent upon the manner or means of employment. As this Court held in a Social Security Act case involving agricultural labor:

> " 'The exception attaches to the services performed by the employees and not to the employee as an individual * *'
>
> Accordingly, the exemption attaches to the 'service performed', which refers to the type of work that is being done, and is not dependent on the form of the contract or whether the

employee is employed by the owner or tenant of the farm or an independent contractor."

Stuart v. Kleck, 129 F (2) 400, 402 (9th CCA).

Lowe v. No. Dak. Comp. Bureau, 66 N. D. 246, 264 N. W. 837, 107 A. L. R. 973.

"* * services rendered by a company in cultivating crops of citrus fruit under contracts with crop owners were 'agricultural labor' rendered in connection with the cultivation of the soil, even though crop owners did not directly hire laborers but dealt with the company, which in turn put laborers to work, and the company was entitled to recover back social security taxes assessed with reference to wages paid to those laborers."

Stuart v. Kleck, 129 F (2) 400, 403 (9th CCA).

Fosgate Co. v. U. S. 125 F (2) 775.

Cal. Employ. Comm. v. Bowden, 126 P (2) 972 (Cal).

Wayland v. Kleck, 112 P (2) 207.

The Kleck case supra was identical with this in that there as here the United States was seeking to recover Social Security taxes from Kleck on account of wages paid by Kleck to laborers employed directly by him, Kleck in turn contracting with farmers for the doing of agricultural labor for such farmers by such laborers. In other words the farmers in the Kleck case, as here through Batt, through Kleck, the immediate or direct employer, employed

services of an agricultural type which Kleck and his crew or organization rendered directly to the farmer, the owner or tenant of the farm on which the farm produce in its raw or natural state was produced. In that case also, as here, the appellee (and here also the trial court) contended that the services were performed in a commercial or industrial, not agricultural, enterprise, and that the laborers were not in the employ of the owner or tenant of the land —considerations which this Court rejected in determining the type of work that was being done.

As said by the Idaho Supreme Court in passing upon the identical service, laborers, year and appellant under the State statute employing the identical language (Record, pp. 6-7) (the effect of which herein will be later discussed):

> "It is clear that the appellant (Batt) does for hire just such work as the farmer would have to do himself or hire someone else to do, on the farm or elsewhere in preparation of his products for market * *"
>
> Batt v. Unemployment Comp. Div., 63 Idaho 572, 123 P (2) 1004.
>
> And in Wayland v. Kleck, 112 P (2) 207:
>
> "What he was doing was not commercial, for he sold nothing. It was not manufacturing, for he made no article out of the raw materials taken from or grown upon the farm."

I

The United States has stipulated that the type of work is agricultural and that others than Batt,

rendering identical services are neither subject to nor have been required to pay contributions (taxes). Why a distinction is made in Batt's case is not readily apparent; presumably the only difference claimed is that Batt employs the laborers, who, through Batt, are employed by the farmer to perform the same essential agricultural services which the farmer requires when he directly employs the laborers or organized crews. In other words apparently the appellee claims the tax solely on account of

> "the form of the contract or whether the employee is employed by the owner or tenant of the farm or an independent contractor"

a distinction which this Court (and others in cases above cited) has directly rejected in the Kleck case.

Certainly no distinction is claimed by the appellee on the theory that the services are performed off the farm, for the stipulation also is that identical services off the farm are not taxable. The stipulation is

> "* * many farmers did in fact process, pack and grade, and conduct the operations, hereinafter set forth on their own premises, in which event such farmers were not charged and did not pay contributions on account of the employees engaged therein; * * in respect to potatoes it was common practice for the farmers of large acreage to have potato cellars either on their own premises or elsewhere, and to employ crews of men who made it their busi-

> ness to go from farm to farm or cellar to cellar and use their own equipment, conduct the operations hereinafter stated, and receive their compensation from the farmer and upon which compensation no contribution was or need be paid; that in respect to peas the largest dealers in Idaho grew their own peas on owned or leased lands and processed their own produce, the processing taking place off such lands in warehouses or sheds available to tracks, performing the same operations as hereinafter stated in the case of the defendant and were not required to and did not pay any contribution with respect to the employees engaged in such operation" (Record, p. 11).

As to 25% of the tax, Batt is the farmer himself, employs the employees himself, and processes his own produce, raised on his own farm. He fits exactly the farmer described in the stipulation and the appellee's own interpretation of non-taxable wages. There can be no question that the Court erred in permitting recovery of 25% of the tax.

As to the balance of the tax, Batt and his crew fit exactly into the description of the professional crews described in the stipulation save only that they do not travel from place to place. We submit that that fact is not sufficient upon which to change "type of work" from agricultural to non-agricultural, from non-taxable to taxable. The Court erred in permitting recovery of any tax.

II

It is likewise stipulated that the type of work is agricultural labor. The stipulation is that "processing" (as in this case used) is an absolute necessity for every farmer who raises this kind of produce for market. It is as essential to the production of a consumable and marketable farm product as is cultivation, sowing, irrigating, harvesting. The State requires it; the Federal government requires it; the market place requires it; it is as incidental and necessary to farm operations as any of the prior steps in agriculture; and every farmer does it, either by himself, by his employees, by employing crews, by employing crews brought together by Batt and others; farmers large and small do it; the produce goes into the same market; the burden of tax, however, would be, if the judgment is affirmed, upon the produce of the small farmer, who must employ crews gathered and kept together as are Batt's, and not any upon the produce of the large farmer who can afford to gather and keep together his own directly employed crew; *yet even if the small farmer is taxed, or Batt is taxed, the controlling purpose of the tax and the Social Security Act is nonetheless defeated because in no event will the laborer employed realize any benefits therefrom.* More about this hereafter.

As said by the Supreme Court of Idaho in a second case involving similar taxes and appellant Batt's employees after the Idaho act had been amended

"* * had the packing and processing been done on their own farms and not in appellant's (Batt's) packing houses, such labor would be exempt. It would therefore follow that small farmers or tenants who are unable to build and equip a processing plant would be required to pay contributions, inasmuch as the owner of the processing plant would charge and collect from the small farmer whatever contributions he would be required to pay for processing, packing and making ready for market the farm products of the small farmer. We are not convinced the legislature in adopting the proviso contained in subsection (f), supra, intended to make possible such discrimination.

We think it was the legislative intent to exclude all services of wage earners in agriculture from the benefits of the act, and exclude from tax burden the produce of all farmers, large or small, whether processed on their own farms or at the processing plant of another, it all being agricultural labor. It clearly was not the intent of the legislature to burden the small farmer's produce with, and relieve the large farmer's produce from, a tax, nor to grant benefits to the wage earner working on the produce of small farmers and deny benefits to the wage earner working on the produce of the large farmers.

* * * * * * *

Appellant's (Batt's) processing of products raised on his own farms was an adjunct to

farming necessary to make marketable his produce. He incidentally processed the produce of his neighbors whose farming operations were not large enough to justify the expense of buying equipment and assembling a crew of laborers. All the labor performed either on appellant's (Batt's) farms or on the farms of his neighbors, of much smaller acreage, was agricultural labor and, as such, exempt under the act. There was nothing done to change the character of the farm products by reason of the processing and packing, they continued to remain farm products. What the occupation, business or profession of the employer may be is not controlling, but what type of service is rendered by the employee to the employer."

In re: P. G. Batt, ---------- Idaho ----------, 157 P (2) 547.

Slight or technical differences in operation may in some instances justify, particularly in taxation, the imposing or not imposing of a tax in quite similar but practically, and actually basically different situations. But merely technical, and not actual, or practical differences in situations do not require, and should not justify, imposing a tax in one instance and not in another, especially where the purpose of levying the tax is not for general revenue but to accomplish a social end which will in fact not be accomplished but defeated, by imposition of the tax.

Such is the fact and end result of imposing the

tax here sought by the United States in this and other similar cases.

For the fact is that, as the Idaho Court says above, the type of work of processing farm produce is identical whether done by the farmer's directly employed laborers on his farm, or off his farm, whether done by professional crews, on or off the farm, or by Batt and his crew on or off the farm; so also the equipment and laborers are the same; so also is the produce the same whether that of a large or small farmer; so also the raw product is and remains the same; so also the incidence of the work to farming is the same; so also the necessity of processing for production and marketing and usability the same; so also does ownership in the farmer all through and until after processing is completed remain the same, that is, in the original producer; so also the farmer producer owner disposes of his processed farm produce in the same way. To say that in any one instance the type of work is agricultural labor and in another not agricultural labor is to ignore the actuality, and ignore type of work as a criteria, and is to make the test one of form and not of substance. To say that in any one instance the laborer's wages are taxable, and in another are not taxable, is to tax upon unsubstantial and unreal distinctions, and to impose the burden of tax upon the small producer's produce and not upon the large producer's produce, both competing in the same market. And in this case, as a result of this particular judgment, to impose the tax upon the total wages paid, is to impose a tax

upon 25% of the labor, which was employed in processing farmer Batt's own produce, self processed, which the appellee stipulates not to be taxable.

Furthermore, the purpose of the Social Security Act and the tax itself is defeated by the decision and taxation. The tax was not levied by the United States for the purpose of general or special revenue, but to persuade or induce the States to impose an identical tax for the purpose of raising funds with which the State, not the United States, appellee, could, and must accomplish a desirable and laudable social end, namely, benefits to unemployed laborers, except agricultural labor (and others excepted by the Federal Act). Yet the moneys paid as tax to the United States under this judgment, or otherwise, will not benefit any laborer, whether employed by Batt or otherwise, or whether a laborer working in Idaho or elsewhere, for the statutory fact is that not one cent of the Federal tax is or will be paid out in benefits to a laborer—the Federal act provides no benefits at all to laborers in Idaho or elsewhere, whether nonagricultural or agricultural.

Furthermore the threat of the Federal tax has accomplished the end, and only end, for which it was designed—Idaho has been induced to adopt an Unemployment Act, acceptable to appellee and which excepts agricultural labor from tax in the identical language by which appellee excepts agricultural labor, both without detailed definition. In Idaho where the work is done and the manner of performing it is understood, the common conception of

agricultural labor includes exactly the type of labor here involved performed as herein performed, contracted for as herein contracted for, and not, therefore, taxable under the Idaho law, and by virtue thereof, no benefits are payable out of Idaho funds, to laborers in processing whether employed as herein or otherwise.

Batt v. Unemployment C. Div., 63 Idaho 572, 123 P (2) 1004.

In re: Batt, ... Idaho ....., 157 P (2) 547.

The recovery of the federal tax herein is a purely gratuitous burden upon the produce of small farmers in Idaho, without corresponding or any benefit to the laborers of Idaho.

The seeking of recovery by appellee, and the recovery granted by the trial court, are exaltations of the impractical over the practical, of technicality and formalism over substance and realism.

IV

The trial court lightly dismissed the decisions of the Supreme Court of Idaho involving this identical case (under the Idaho Act) and holding the services to be agricultural and non-taxable.

Batt v. Unemployment C. Div. 63 Idaho 572, 123 P (2) 1004.

In re: Batt, ... Idaho ....., 157 P (2) 547,

by stating the rule that Federal courts are not bound by state interpretations of Federal Acts (Record, p. 28). The Idaho court did not, however, interpret the Federal Act, did not purport to do so, and appellant did not and does not now urge that the Federal Courts are so bound.

What we did, and do, urge is that in view of the unique circumstance here existing where the accomplishment of the great social purpose of the Federal Social Security Act depends for practical and nondiscriminatory administration upon the interpretation of identical statutory words used in both the Federal and the cooperative and necessary State statutes the interpretation of the words by the highest court of the State prior to the interpretation by the Federal court, under identical facts, should be given the highest persuasive weight by the Federal Courts, and the latter in the interests of harmony and practicability, and in the interest of cooperation and of accomplishing the basic purpose of the Federal Act, should not unless otherwise compelled by the strongest reasons adopt a different construction. And this especially where different construction amounts in practice to a penalty upon some, but not all, farm produce, discrimination between small and large producers, and no attendant benefit to laborers.

There is nothing startling in the proposition. Federal Courts adopt, or cite as authority, the interpretations of State Courts and so State Courts do as to Federal Courts. This Court in its North Whittier Heights decision (109 F (2) 76) upon the

National Labor Relations Act cited the decision of a lower state court (Pinnacle Packing Co. v. State Unemployment Commission, unreported); in Stuart v. Kleck, 129 F (2) 400, a decision involving the act in question here, this Court cited state cases from North Dakota, Iowa and Minnesota and the parallel case of Wayland v. Kleck, 112 P (2) 207, an Arizona case in which the controversy arose.

The spirit and practicability and harmony of so doing is illustrated by this Court's observation that

> "* * when the Congress, in providing for an exemption from the provisions of the (Social Security) Act, made use of the broad term 'agricultural labor' this expression, used by itself, must be given a meaning wide enough to include agricultural labor of any kind, as generally understood throughout the United States."
>
> Stuart v. Kleck, supra, citing a North Dakota State decision and U. S. v. Turner Turpentine Co., 111 F (2) 400, which held
>
> "* * It is now a settled principle of statutory construction that Congress * * * must be regarded as having had in mind the *actual conditions* to which the act will apply, that is, the uses and needs of such activity. When then, Congress in passing an act like the Social Security Act uses, in laying down a broad general policy of exclusion, a term of as general import as 'agricultural labor' it must be considered that it used the term in a sense and

> intended it to have a meaning wide enough and broad enough to cover and embrace agricultural labor of any and every kind *as that term is understood in the various sections* of the United States where the act operates. * * * It does mean, however, that when a word or term intended to have general application in an activity as broad as agriculture has a wide meaning it must be interpreted broadly enough to embrace in it all the kinds and forms of agriculture practiced *where* it operates * *"

That decision gave great weight to the understanding in Georgia, where it arose, that labor in turpentine and rosin production was in that state agricultural labor notwithstanding that it involved a change in the raw product harvested from trees by a distilling process after gathering which separated such raw product into two different products, i.e., turpentine and rosin. The Fifth Circuit Court of Appeals adopted the State understanding in its interpretation of "agricultural labor" used in the Federal Social Security Act. In the present case before this Court the raw product from the farm is not changed in any respect by processing, and the Idaho Court has held the services to be agricultural labor.

And it must not be overlooked in this case that in addition to the Idaho decisions classifying the identical services as agricultural labor, the appellee itself has by stipulation classified the identical labor, save as to Batt, as agricultural labor (Rec-

ord, pp. 9, 13, 14-15) and non-taxable. No distinction at all exists as to 25% of the tax attributable to processing Batt's own produce; no substantial or compelling difference has been pointed out or exists with respect to processing other farmer's produce by Batt's crew so as to place that in a different and taxable category.

The cooperative character of the Federal and State Social Security Acts, and the desirability of practical uniformity and harmony in the interpretation of both is stated in Buckstaff Bath House Co. v. McKinley, 308 U. S. 359, 363, 84 L. ed. 322, 325.

> "For that (federal) act laid the foundation for a cooperative endeavor between the states and the nation to meet a grave emergency problem. * * * that Act was an attempt to find a method by which the states and the federal government could work together to a common end. * * * The Act was designed therefore to operate in a dual fashion—state laws to be integrated with the Federal Act; payments under state laws could be credited against liabilities under the other. That it was designed so as to bring the states into the cooperative venture is clear * *.
>
> * * * it would seem to be a fair presumption that the purpose of Congress was to have the state law as closely coterminous as possible with its own. *To the extent that it was not, the hopes for a coordinated and integrated dual system would not materialize.*"

The Idaho State law expressed also a purpose for harmonious and cooperative operation of the acts:

> "Section 2 * * (b) This law is enacted for the purpose of securing for this state the maximum benefits of the Act of Congress * * and to enable the workmen of Idaho to benefit * * from the provisions of said act, and so far as possible shall be interpreted to conform to the provisions thereof and to the decisions of the courts thereon."
>
> Chap. 12, 1935 3d Extra Sess. Idaho Legislature.

We are aware that the Federal tax may be imposed whether or not a state joins in the cooperative effort, and aware that the federal act term "agricultural labor" is not *required* to be interpreted to cover the same labor as "agricultural labor" in the state, but it was the undoubted *intention* of Congress and of the State legislature that the term cover the same labor; both used the same term in 1938; both have since reiterated the identical term and the definition thereof—

> "(1) Agricultural labor (as defined in subsection (l) of this section; * *
>
> (l) The term "agricultural labor" includes all service performed—* *
>
> (4) In handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to market or to a carrier for transportation to market, any

agricultural or horticultural commodity; but only if such service is performed as an incident to ordinary farming operations or, in the case of fruit and vegetables, as an incident to the preparation of such fruits or vegetables for market. * *"

Act Aug. 10, 1939, c. 666, Title II, Sec. 209, 53 Stat. 1373 (Title 42, Sec. 409, U. S. C.)
Sec. 19 E (f), Chap. 29, pp. 59, 60, Idaho Sess. Laws 1943,

thus again evidencing a common intention under which the tax is not imposed upon the services rendered, as here, by either government.

Is there now in 1945 any compelling reason why this Court should say that for 1938 alone agricultural labor, then recognized and understood in Idaho and again in 1941 by the Courts of Idaho and in 1939 by the Congress, and again in 1943 by the laws of Idaho to include the services in this case, should not include such services and a tax be recovered thereon? Especially in view of the discrimination therefrom arising and hereinbefore pointed out, and of the fact that laborers for whose benefit the laws were enacted cannot and will not be benefited?

V

The trial court rejected this Court's decision in Stuart v. Kleck, 129 F (2) 400 upon the ground that therein was involved work upon a farm. Instead it adopted the "commercial" test of agri-

cultural labor stated in this Court's decisions upon the National Labor Relations Act in No. Whittier Heights Citrus Assn. v. National Labor Relations Board, 109 F (2) 76 and Idaho Potato Growers v. National Labor Relations Board, 144 F (2) 295. The trial court said it was bound by those decisions (Record, pp. 25-28, 31).

Furthermore the trial court in its later opinion said (Record, p. 31)

> "* * one is forced to the conclusion that *from* the time farm produce is delivered to the defendant *and processed*, agricultural labor ceases, and the activities of the defendant from *then* on are of a commercial character and enter the field of industry,"

entirely overlooking, or ignoring, the fact stipulated that *only* wages in respect to *processing* are involved, and that *no* wages with respect to labor or services "from then on", i.e., in purchasing produce, or acting as farmers' selling agent on consignment of the farmer producer, are involved. The stipulation reads

> "The individuals employed, and the total wages *upon which excise tax is claimed*, and contributions mentioned in paragraph 5 of the complaint, and the services of employees *are in respect* to the above and hereinafter described "*processing*" *operations* (Record, p. 7; see also p. 15).

> "The operations which took place at the defendant's sheds and which constituted "processing" as used herein, were primarily a cleaning, sorting, grading and packing operation and in no way changed the raw produce; they were as follows; (then is described in detail the "processing" none of which include purchasing or consigning seller's agent labor) (Record, pp. 12-15)."

Purchasing and consigning were stipulated to occur after "processing" had ended (Record, pp. 8, 10).

The trial court itself found that the tax was only upon processing wages, and that purchasing and consigning labor was after processing and therefore not involved herein (Record, pp. 19, 21, 22, 23, 24-25).

The trial court thus held that processing was agricultural labor, and then inconsistently confused processing with other activities not involved and decreed the whole to be commercial and taxable.

Further the trial court overlooked the applicable principles laid down by this Court in the Kleck case, supra. As applied to this case the significance of the latter case is not in the *place* where the services were rendered, the only thing the trial court considered (Record, pp. 27-28) but in the rejection by this Court of the "commercial" theory in determining agricultural labor under the Social Security Act, and the adoption of the "type of work" theory or test. Kleck stood in exactly the same position as

Batt in respect to his relations with farmers and laborers, and this Court held that relationship did not make agricultural labor non-agricultural;

> "Accordingly (this Court says), the exemption attaches to the 'services performed', which refers to the type of work that is being done, and is not dependant on the form of the contract or whether the employee is employed by the owner or tenant of the farm or an independent contractor."

Yet, the trial court gave no consideration to "type of work" (Record, p. 29), and based its decision wholly upon *appellant Batt's* activities, after processing, which the court said were commercial (Record, pp. 27, 31).

The trial court further overlooked this Court's holding in the Kleck case that, in harmony with Fosgate Co. v. U. S., 125 F (2) 775, and Cal. Employ. Comm. v. Bowden, 126 P (2) 972, the services were in the employ of the owners or tenants of farms and excepted agricultural labor notwithstanding the

> "crop owners did not directly hire laborers but dealt with the Company, which in turn put laborers to work, and the company was entitled to recover back social security taxes assessed with reference to wages paid those laborers."

The trial court further based its decision and the judgment solely upon National Labor Relations Act

cases (Record, pp. 25-27, 28, 29, 31) again overlooking, or ignoring, the fact that this Court had said in the Kleck case that its decision therein did not conflict with its North Whittier Heights Association case and had said in Idaho Potato Growers v. National Labor Relations Board, 144 F (2) 295, 301

> "It must be borne in mind, however, that the purpose of the statutes governing these federal and state activities (Social Security Act) are very different from the purposes of the so-called Wagner Act (National Labor Relations Act) with which we are here dealing."

There are two and only two factual differences between the case of Stuart v. Kleck and this case, and neither is material. The work of the laborers in the Kleck case was preparing land for cultivation, seeding, constructing dams and reservoirs, operating and repairing farm machinery; the work of the laborers herein was in rendering farm produce marketable and usable. That difference is not material for the latter was as essential, necessary and incidental to agriculture as was cultivation, seeding, irrigating and was stipulated to be non-taxable labor when done for farmers by their own employees or professional crews. The objective of farming is the production and marketing of usable, consumable farm produce, and no matter how much cultivation the produce received on the farm, it still was not marketable or consumable raw produce without processing. It is so stipulated (Record pp.

8-9) and even if not stipulated would be true in fact.

> See Jones v. Gaylord Guernsey Farms, 128 F (2) 1008, 1011 (10th Cir.).
> Stuart v. Kleck, 129 F (2) 400, 402.

The other difference is that labor in the Kleck case was, apparently, largely if not wholly, on the farm; herein it was not. Again it is stipulated that the difference is immaterial, the labor when done by a farmer's employees or by professional crews on or off the farm was non-taxable (Record, p 9). Furthermore the statute did not make the *place* of work a criteria.

VI

The *place* of work is not a criteria. Whether the labor be on or off the farm is immaterial if the type of work is agricultural. The appellee agrees by stipulation that the place of work is not determinative of the type of work, and it agrees that the type of work is agricultural (Record, pp. 8-9).

The Act does not require the labor to be on a farm; it only requires that it be agricultural.

The regulations did not require the work to be on a farm. If they had, and the labor was in fact agricultural, the regulations would have been void, for the Act gave no power to make definitive regulations. It gave power only to make regulations for *enforcement.*

> Section 1108, Title 42, U. S. C.

The Commissioner could not have made agricultural that which was not so in fact; nor made non-agricultural that which was in fact agricultural. He could neither extend nor restrict; he could not say that ploughing was not agricultural labor; he could not say that manufacturing farm machinery was agricultural labor.

> California Employment Comm. v. Bowden, 126 P (2) 972, 976, 979.

Nor did the Commissioner purport to do so. Regulations 90, Art. 206 reads

> "The term 'agricultural labor' *includes* all services performed—(giving categories)."

It does not purport to say that it *excludes* anything else which is agricultural labor in fact. It is not an exclusive and sole definition. In truth the Social Security Act expresses the will of Congress that

> "(a) When used in this chapter—* * *
> (b) The terms 'includes' and 'including' when used in a definition contained in this chapter shall not be deemed to exclude other things otherwise within the meaning of the term defined."
>
> Sec. 1301, Title 42 U. S. C.

And the United States, appellee, stipulates that the type of labor, on or off the farm, is agricultural and non-taxable, as hereinbefore stated; without

such stipulation, the facts are that the type of labor is so essential, so incidental, to the chain of production of marketable produce as to be obviously agricultural.

Furthermore the regulations did not require this type of labor to be performed on the farm. It did require cultivation on a farm and this was referred to in Stuart v. Kleck, but otherwise the place was not material in the partial definition, which read (Reg. 90, Art. 206 (1))

> "Agricultural labor—The term 'agricultural labor' includes all services performed—* * *
>
> (b) By an employee in connection with the processing of articles from materials which were produced on a farm; also the packing, packaging, transportation or marketing of those materials or articles. Such services do not constitute 'agricultural labor', however, unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced, and unless such processing, packing, packaging, transportation or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations."

The services herein were upon materials produced on farms, either Batt's or those of others; they were performed by employees of the owners or tenants of the farms upon which the materials were

produced (Stuart v. Kleck, supra; Fosgate Co. v. U. S., supra) in their raw or natural state, and the services were carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations and so stipulated.

The judgment should be reversed not only with respect to 25% of the tax attributable to Batt's farm produce and services thereon, but also with respect to the whole tax.

Respectfully submitted,

SAM S. GRIFFIN
W. H. LANGROISE
Attorneys for Appellant
Residence: Boise, Idaho

No. 11091

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

P. G. BATT,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

On Appeal from the District Court of the United States for the District of Idaho, Southern Division

---

BRIEF FOR THE UNITED STATES

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
A. F. PRESCOTT,
JOHN W. FISHER,
Special Assistants to the Attorney General.

JOHN A. CARVER,
United States Attorney.
ERLE H. CASTERLIN,
Assistant United States Attorney.

Filed, ----------, 1945

----------, Clerk.

OSTER PRINTING COMPANY, BOISE, IDAHO—10-1-'45—45

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11091

P. G. BATT,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

On Appeal from the District Court of the United States for the District of Idaho, Southern Division

---

BRIEF FOR THE UNITED STATES

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
A. F. PRESCOTT,
JOHN W. FISHER,
Special Assistants to the Attorney General.

JOHN A. CARVER,
United States Attorney.
ERLE H. CASTERLIN,
Assistant United States Attorney.

INDEX

CITATIONS

Cases:

Page

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 11091

P. G. BATT,

Appellant

vs.

UNITED STATES OF AMERICA,

Appellee

On Appeal from the District Court of the United States for the District of Idaho, Southern Division

---

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the District Court (R. 17) is reported in 59 F. Supp. 619. The District Court also wrote an opinion denying the taxpayer's petition for reconsideration (R. 29) which was not reported.

JURISDICTION

This is a suit by the United States under Section 3744 of the Internal Revenue Code to collect social security taxes for the year 1938 in the amount of $571.33, plus interest. (R. 2-3) The judgment of the District Court

was entered April 6, 1945. (R. 34.) Notice of appeal was filed June 20, 1945. (R. 34-35.) The jurisdiction of this Court rests on Section 128(a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the services rendered by certain employees of the taxpayer constituted "agricultural labor" within the meaning of Section 907(c) of the Social Security Act.

STATUTE AND REGULATIONS INVOLVED

Social Security Act, c. 531, 49 Stat. 620:

> SECTION 901. On and after January 1, 1936, every employer (as defined in section 907) shall pay for each calendar year an excise tax, with respect to having individuals in his employ, equal to the following percentages of the total wages (as defined in section 907) payable by him (regardless of the time of payment) with respect to employment (as defined in section 907) during such calendar year:
>
> * * * * * *
>
> (3) With respect to employment after December 31, 1937, the rate shall be 3 per centum. (42 U.S.C. 1940 ed., Sec. 1101.)
>
> SEC. 902. The taxpayer may credit against the tax imposed by section 901 the amount of contributions, with respect to employment during the tax-

able year, paid by him (before the date of filing his return for the taxable year) into an unemployment fund under a State law. The total credit allowed to a taxpayer under this section for all contributions paid into unemployment funds with respect to employment during such taxable year shall not exceed 90 per centum of the tax against which it is credited, and credit shall be allowed only for contributions made under the laws of States certified for the taxable year as provided in section 903. (42 U.S.C. 1940 ed., Sec. 1102.)

SEC. 907. When used in this title—

* * * * * *

(c) The term "employment" means any service, of whatever nature, performed within the United States by an employee for his employer, except—

(1) Agricultural labor;

* * * * * *

(42 U.S.C. 1940 ed., Sec. 1107.)

Treasury Regulations 90, promulgated under Title IX of the Social Security Act:

ART. 206(1). *Agricultural labor.*—The term "agricultural labor" includes all services performed—

(a) By an employee, on a farm, in connection with the cultivation of the soil, the harvesting of crops, or the raising, feeding, or management of livestock, bees, and poultry; or

(b) By an employee in connection with the processing of articles from materials which were produced on a farm; also the packing, packaging, transportation, or marketing of those materials or articles. Such services do not constitute "agricultural labor", however, unless they are performed by an employee of the owner or tenant of the farm on which the materials in their raw or natural state were produced, and unless such processing, packing, packaging, transportation, or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations.

As used herein the term "farm" embraces the farm in the ordinarily accepted sense, and includes stock, dairy, poultry, fruit, and truck farms, plantations, ranches, ranges, and orchards.

Forestry and lumbering are not included within the exception.

STATEMENT

The District Court found that during 1938 the taxpayer had individuals in his employ to whom he paid total wages of $30,198.38. (R. 32.) The taxpayer filed a return under Title IX of the Social Security Act, reporting the wages paid. (R. 32.) Of the total of $30,198.38 so paid and reported, the sum of $22,705.08 was paid as wages for services which were not agricultural labor but were of a commercial character and in the

field of industrial activity and were performed within the United States by an employee for his employer and were covered by provisions of Title IX of the Social Security Act. (R. 32-33.) The sum of $22,705.08 is subject to the tax thereon at the rate of three per cent in the amount of $681.15. The taxpayer paid $68.11 on January 26, 1939, on account of the tax, and is entitled to credit against the tax for contributions paid into the unemployment funds of the State of Idaho in the sum of $41.71, leaving a balance of $571.33 unpaid and owing to the United States as of January 26, 1939. (R. 33.)

The District Court concluded that the United States was entitled to judgment against the taxpayer for $571.33, with interest and costs, and directed the entry of judgment accordingly. (R. 33.) The taxpayer's appeal is from the judgment so entered. (R. 34.)

The only issue raised by the taxpayer is whether the services of the employees with respect to which the tax was imposed were agricultural labor within the meaning of the applicable statute. (Br. 7.)

The facts pertaining to the services were stipulated. (R. 5.) The taxpayer was a farmer, owning or operating as a tenant between 800 and 900 acres of farm land near Homedale and Wilder, Idaho, on which he raised potatoes, onions, lettuce, carrots and peas (and other farm crops). (R. 7.) He also operated, seasonally, two "processing" sheds, located off his farm lands near trackage. (R. 7.) At those sheds, he employed labor in the

work of "processing", grading and packing and marketing the produce raised on his own lands, and in doing similar work for other farmers, who paid him for the service. (R. 7, 8, 10, 11, 12, 13.)

Approximately 25 per cent of the produce "processed" was raised and owned by the taxpayer, and approximately 75 per cent thereof was raised and owned by other farmers. (R. 7.)

The labor performed on the farm or in connection therewith, except in processing, is not in issue herein. Only the labor performed off the farm, in the taxpayer's processing sheds, in processing, packing and preparing the produce for market, is involved. (R. 7, 19.)

The processing which took place at the taxpayer's sheds consisted primarily of a cleaning, sorting, grading and packing operation, and in no way changed the produce. (R. 12, 13.) The produce from the taxpayer's farming operations and the produce of the other farmers were intermingled and went through the process together. (R. 13.)

Aside from the produce raised by the taxpayer, the produce which he processed was procured in the following ways:

He purchased from the farm producer, that portion of his crop which was found to be marketable after being sorted and graded. To enable the taxpayer and the farmer to determine the part purchased and to prepare the produce for the market, the farmer delivered his

produce at the taxpayer's sheds in half bags as he took it from the field. (R. 10)

The taxpayer also handled a comparatively small part of potatoes on consignment, in which cases the farmer delivered the potatoes from the field as hervested, and after the taxpayer processed them, he sold them, and from the sale price, deducted the expense, including a charge for processing and brokerage, and paid the balance to the farmer. (R. 10.)

In the case of all produce, the culls or non-marketable produce, were owned by and went back to the farmer producer, or were disposed of as he directed and did not go to market. (R. 10.)

In the case of lettuce, peas and carrots, the taxpayer processed and sold that grown by him; and that which was not grown by him, he handled and sold only on consignment for the farmer owner, as described above in the case of potatoes. (R. 10.)

In the case of potatoes, they were delivered at the sheds, covered with dirt and intermingled with clods, vines, sticks, culls, and some bruised, cut, rotten and mis-shaped, just as dug from the ground. The potatoes were cleaned by hand of clods and vines, and were screened of dirt, then placed in a mechanical washer for cooling and washing, or sprayed with a hose. They were then placed on tables, and were hand sorted and graded and the marketable part was placed in bags, and then trucked by hand into cars, where they were packed for shipment, and the cars were iced.

In the case of onions, the same operations took place except that they were not washed. (R. 14.)

In the case of lettuce, delivery was made by the farmer in his own truck, and the taxpayer took over at the shed. (R. 14.) The processing operations consisted of trimming off the butt and surplus and broken and discolored leaves and discarding heads not suitable for the market. The marketable heads were then sorted on the tables as to size and placed in crates containing the same size heads, with ice between the layers. The crates were stamped with the number of heads, paper was folded over them, with ice on top, and the cover was nailed on. The crates were loaded into a car and ice placed over the crates in the car. (R. 14.)

In the case of peas, delivery was made into the sheds in sacks, the contents were dumped on a table, and unmarketable peas, such as those too small, ill-shaped, broken, bruised and old, were picked out by hand. The marketable peas were placed in hampers or tubs; sometimes the top layers were straightened out or "faced" to give a better appearance; the hamper was labeled; a cover was placed on it; it then went into a tank of cold water for cooling, and then into the car and was loaded and ice placed on top for refrigeration. (R. 15.)

In the case of carrots, the farmer producer graded and tied them in bunches on the farm; placed the bunches in crates, and delivered the crates to the taxpayer; the bunches were then washed, sized, packed and placed

in cars, with ice in the crates and the cars as in the case of lettuce. (R. 15.)

The processing operations were largely seasonal as to all the crops, the length of the season varying according to the crop. (R. 11.)

The taxpayer has raised no question as to the amount of tax due the Government if the labor is held subject to tax.

SUMMARY OF ARGUMENT

The Treasury Regulations are a proper construction of the term "agricultural labor". Under these Regulations, two conditions must be present in order that processing, packing and marketing of vegetables may be considered "agricultural labor". They are not agricultural labor unless (1) performed by an employee of the producing owner or tenant and (2) unless they are carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations. Both of these conditions were not present in the case of any of the employees.

The Social Security Act should have a nation-wide construction; state laws are not controlling.

The finding of the District Court that the services were not agricultural labor but were of a commercial character and in the field of industrial activity was clearly not erroneous, and is decisive of the issue.

ARGUMENT

THE SERVICES PERFORMED BY THE TAXPAYER'S EMPLOYEES IN PROCESSING, PACKING, AND MARKETING VEGETABLES WERE PROPERLY HELD TO BE OF A COMMERCIAL CHARACTER AND NOT "AGRICULTURAL LABOR"

The provision of the Treasury Regulations that processing, packing or marketing of farm products does not constitute "agricultural labor" unless performed by an employee of the producing owner or tenant and unless such processing, packing or marketing is carried on as an incident to ordinary farming operations as distinguished from manufacturing or commercial operations, was approved in *Chester C. Fosgate Co.* v. *United States,* 125 F. 2d 775 (C.C.A. 5th), as a practical, workable and reasonable interpretation of what should be treated as "agricultural labor", and was also referred to with approval in *Lake Region Packing Ass'n* v. *United States,* 146 F. 2d 157 (C.C.A. 5th).

The Supreme Court has in numerous cases recognized the importance of the administrative construction of a statute. In *Maryland Casualty Co.* v. *United States,* 251 U.S. 342, the Court said (p. 349):

> It is settled by many recent decisions of this court that a regulation by a department of government, addressed to and reasonably adapted to the enforcement of an act of Congress, the administration of

> which is confided to such department, has the force and effect of law if it be not in conflict with express statutory provision. * * *

To the same effect is *Brewster* v. *Gage,* 280 U.S. 327, 336.

The term "agricultural labor" was not defined in the Social Security Act, and administrative construction was obviously intended.

It is to be noted that the two conditions specified in the Regulations are in the conjunctive, so that if either is absent, the service is not "agricultural labor" within the Regulations. Both conditions are not present in the case of any of the employees here in question, and therefore none of the services involved are "agricultural labor" within the Regulations.

In *North Whittier Heights C. Ass'n* v. *National L. R. Board,* 109 F. 2d 76, certiorari denied, 310 U.S. 632, this Court had occasion to construe and apply the term "agricultural laborers" as used in the National Labor Relations Act. The laborers there involved were engaged in the work of processing, packing, and marketing citrus fruits. The employer there made the same argument as is made by the taxpayer here (Br. 12) that the nature of the work was the true test, without regard to whether it was carried on by the farmer who produced the fruit, or on a commercial scale, or under industrial conditions, and the Court was asked to conclude that nothing but the nature of the work was significant. The Court refused to accept that test. The Court said (p. 80):

> The conclusion does not follow. The factual change in the manner of accomplishing the same work is exactly what does change the status of those doing it.

The Court concluded that the employees there involved, whose work and working conditions were essentially similar to the work and working conditions here involved, were not "agricultural laborers" within the meaning of the statute there involved.

In *Idaho Potato Growers* v. *National Labor Rel. Board,* 144 F. 2d 295, 300, this Court again considered the meaning of "agricultural laborers" under the National Labor Relations Act and reached a similar conclusion.

We ask the Court to make the same distinction here between true agricultural labor and commercial activity. The finding of the District Court that the services were not agricultural labor but were of a commercial character and in the field of industrial activity was clearly not erroneous, and is decisive of the issue. The handling of *all* the produce from the time it was delivered to the taxpayer at the sheds was carried on by the taxpayer, not in connection with his farming activities, but in connection with and as part of the operation of his commercial enterprise of processing and marketing farm produce. These operations were not incidental to his own farming operations nor to those of the other farmers. The fact that they can be and are sometimes carried on by farmers themselves on their own farms as an incident

to farming, does not make them any less commercial in character as carried on in this case.

The lower court properly distinguished the case of *Stuart* v. *Kleck,* 129 F. 2d 400 (C.C.A. 9th), as involving work done on a farm, and not work done in the processing, packing or marketing of produce. The taxpayer argues (Br. 22-23) that the decision of the Idaho Supreme Court (*Batt* v. *Unemployment Compensation Division,* 63 Idaho 572, 123 P. 2d 1004) should be followed, that a state interpretation, rather than a nation-wide construction is warranted here. This Court rejected that view in *Matcovish* v.*Anglim,* 134 F. 2d 834, 836. The Court there was considering Section 907 of the Social Security Act, *supra,* the same section as is involved here. In that case, involving employment in California, the state court had held that the taxpayer there involved was not an employer under the state law, and this Court stated (p. 836) that it would have to hold against the tax if the state law was controlling. The Court cited *Buckstaff Co.* v. *McKinley,* 308 U.S. 358, as holding that the purpose of Congress was to have the state law as closely coterminous as possible with its own, and on the authority of that case, held that the state law was not controlling, and that the federal act must be given a nation-wide interpretation.

The principal basis for the argument of the taxpayer on this point is that the unemployment tax of Title IX involves the cooperation of the states in its administration. (Br. 23-27.) But the same definition of em-

ployment and the same exception of agricultural labor are provided under Section 811(b) of Title VIII of the Social Security Act, which does not involve such state participation. Obviously the terms should have the same interpretation under both titles, and this requires a nation-wide interpretation.

The fact that the particular employees here involved may not be benefited by the tax because of the state decision cannot be permitted to control the decision as the taxpayer argues (Br. 17), for that would be to make state decisions controlling, contrary to the decision of this Court and of the United States Supreme Court, cited above. The United States did not stipulate, as the taxpayer asserts (Br. 14, 17) that the type of work is agricultural. It was agricultural work or not, depending on the conditions under which it was done, as those conditions gave character to it. The activities were like those in *Lake Region Packing Ass'n* v. *United States,* 146 F. 2d 157 (C.C.A. 5th), where the court said (p. 160) the activities were not "per se agricultural" and were "deprived of their agricultural character by the dominance in the operation of their commercial character."

The activities here involved were all commercial in character, and therefore none constituted agricultural labor. The same rule should therefore be applied as to all the employees.

CONCLUSION

The Government urges that the judgment of the District Court should be affirmed.

Respectfully submitted,

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.

SEWALL KEY,

A. F. PRESCOTT,

JOHN W. FISHER,
Special Assistants to the Attorney General.

JOHN A CARVER,
United States Attorney.

ERLE H. CASTERLIN,
Assistant United States Attorney.

September, 1945.

No. 11096

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SISQUOC RANCH COMPANY, a Corporation, on its own behalf and on behalf of Homer Sheldon Green,

Appellants,

vs.

MAX ROTH, Lt. Colonel, Infantry, Army of the United States,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

---

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

No. 11096

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SISQUOC RANCH COMPANY, a Corporation, on its own behalf and on behalf of Homer Sheldon Green.

Appellants,

vs.

MAX ROTH, Lt. Colonel, Infantry, Army of the United States,

Appellee.

TRANSCRIPT OF RECORD

Upon Appeal from the District Court of the United States for the Southern District of California, Central Division

---

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

INDEX.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italics; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italics the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS:

For Appellants:

OVERTON, LYMAN, PLUMB, PRINCE & VERMILLE,

733 Roosevelt Bldg.,
Los Angeles 14, Calif.

For Appellee:

CHARLES H. CARR,
United States Attorney,

RONALD WALKER and ROBERT E. WRIGHT,
Assistants U. S. Attorney,

600 U. S. Post Office and Court House Bldg.,
Los Angeles 12, Calif. [1*]

---

*Page number appearing at foot of Certified Transcript.

In the District Court of the United States
Southern District of California

Central Division

No. 4369-O'C Civil

In the Matter of the Petition of SISQUOC RANCH COMPANY, a corporation, on its own behalf, and on behalf of HOMER SHELDON GREEN, for a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable, the Judges of the United States District Court, Southern District of California, Central Division:

The petition of Sisquoc Ranch Company, a corporation, on its own behalf and on behalf of Homer Sheldon Green, respectfully shows as follows:

I.

That Sisquoc Ranch Company is a corporation duly organized and existing under and by virtue of the laws of the State of California, with its principal place of business located in the County of Santa Barbara, State of California, and within the Southern District of California.

That Homer Sheldon Green is a citizen of the United States and is of the age of 21 years. [2]

II.

That Homer Sheldon Green is unlawfully detained, confined and restrained of his liberty by Colonel W. W. Hicks, Commanding Officer, of Fort MacArthur, in Los

Angeles County within this district, by virtue of his wrongful and unlawful induction into the Armed Forces of the United States pursuant to the wrongful and unlawful reclassification of the said Homer Sheldon Green, on or about December 21, 1944, by Local Board No. 144, in the City of Santa Maria, County of Santa Barbara, State

[FEC]

of California, and on or about January 31, 1945, by the Santa Barbara County Appeal Board, from Class II-C to Class I-A; that said detention, confinement, *restrain,* induction and reclassification, and each of such acts, were unlawful, null and void, illegal and without authority of law, for the reasons hereinafter set forth.

III.

That this petition is filed by your petitioner Sisquoc Ranch Company, on its own behalf as the employer of the said Homer Sheldon Green, and also on behalf and at the request of the said Homer Sheldon Green, who is now in custody of Colonel W. W. Hicks, and is in peril of being removed from the jurisdiction of this Honorable Court before he can act in person.

IV.

That on or about June 30, 1942, Homer Sheldon Green duly registered with Local Board No. 144, located in Knights of Pythias Building, in the City of Santa Maria, County of Santa Barbara, State of California, and has duly complied with all of the terms and provisions of the Selective Training and Service Act of 1940, as amended, the regulations promulgated thereunder, and the proclamation pertaining thereto as issued by the President of the United States; that the order number of Homer Sheldon Green is 12901. [3]

V.

That said Local Board No. 144 had powers granted to it by the said Selective Training and Service Act, as amended, the regulations promulgated thereunder, and the proclamation of the President of the United States, to classify registrants for service in the Armed Forces of the United States, and for limited service, and to grant deferments and exemptions.

VI.

That petitioner Sisquoc Ranch Company owns and operates a ranch consisting of more than 41,000 acres of land situated in the County of Santa Barbara, State of California, and extending over approximately 30 miles of the Sisquoc River water-shed; that the said ranch is devoted to agriculture, including the production of barley, oats, beans, sugar-beets, cauliflower, potatoes, hay, grain, alfalfa and numerous other food-stuffs and agricultural commodities; that the said petitioner Sisquoc Ranch Company also owns and ranges a very large quantity of livestock on its said ranch; that approximately 1,000 head of beef are marketed annually and made available for military and civilian consumption.

VII.

That Homer Sheldon Green was employed by petitioner Sisquoc Ranch Company during the month of October, 1943, and was continuously so employed until he was wrongfully and unlawfully inducted into the Armed Forces of the United States as hereinafter set forth. That Homer Sheldon Green was, at the time of said induction and for a long time prior thereto had been, employed by petitioner Sisquoc Ranch Company as its Assistant Superintendent; that as said Assistant Superintendent Homer Sheldon Green had complete charge of op-

erations at ranch headquarters at all times during the absences of the Superintendent from said headquarters; that the duties and responsibilities of Homer Sheldon Green, as said Assistant Superintendent, consisted, among other things, of [4] the following: (a) charge of feeding of pen-fed beef; (b) operation, maintenance and care of numerous steam and gas engines maintained on said ranch; (c) operation and maintenance of a large electric generating plant furnishing light and power to said ranch properties; and (d) maintenance of the ranch irrigation system, and of all fences and inclosures used in the production of livestock.

VIII.

That due to the stress of war conditions and labor problems in agriculture, your petitioner Sisquoc Ranch Company has been subjected to acute and critical labor shortages; that aside from the Superintendent, said Homer Sheldon Green was the only other permanent employee capable of exercising responsibility in connection with the ranch operations; that in addition to the Superintendent and Homer Sheldon Green, your petitioner has at various times during the last two years only been able to employ from two to eight men to assist in the operation of said ranch; that all other employees have been what is commonly known as "floating labor," which has been very unreliable as to ability and duration of employment; that due to such critical labor situation the number of employees has been greatly reduced, and that at times during the months of December, 1944, and January, 1945, petitioner had only two employees in addition to said Superintendent and Homer Sheldon Green. That Homer Sheldon Green is a skilled agricultural worker and qualified as a gas, steam and electrical mechanic.

IX.

That by reason of the facts aforesaid Homer Sheldon Green is vitally and critically needed by your petitioner in its said multitudinous agricultral operations, and no satisfactory replacement can be obtained for his said employment. [5]

X.

That your petitioner Sisquoc Ranch Company did, on October 26, 1943, file with said Local Board No. 144, an affidavit on Selective Service DSS Form No. 42 claiming deferred classification for said Homer Sheldon Green, a true copy of which is attached hereto, marked Exhibit A, and made a part of this petition; that subsequently on March 30, 1944, your petitioner filed another affidavit with the said Local Board No. 144 on Selective Service Form No. 42 stating additional facts in support of said claim for an occupational classification for Homer Sheldon Green, a true copy of which is attached hereto, marked Exhibit B, and made a part of this petition; that in said affidavits your petitioner Sisquoc Ranch Company stated the facts as above set forth regarding your petitioner's agricultural activities and duties and responsibilities of Homer Sheldon Green and the acute labor conditions confronted by your petitioner.

XI.

That under date of July 11, 1944, Robert B. Hollister, Chairman, Santa Barbara County, United States Department of Agriculture War Board, wrote the following recommendation to the said Local Board No. 144, in regard to Selective Service registrant Homer Sheldon Green:

> "The Santa Barbara County USDA War Board has examined the above case and finds this man has

become even more critical since the last investigation. The manpower shortage on this large ranch puts an additional responsibility on the registrant. He is responsible for the maintenance of the irrigation system in connection with the irrigating land and for the maintenance of fences, etc., in connection with the production of the large volume of beef cattle. Deferment strongly recommended." [6]

XII.

That said Local Board No. 144, on or about July 22, 1944, classified the said Homer Sheldon Green in Class II-C, the said class being the category specified by Selective Service regulations for deferment of persons found by said Local Board to be "necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, and for whom a satisfactory replacement cannot be obtained."

XIII.

That the Tydings amendment to the Selective Training and Service Act, 50 U. S. C. A. (Appendix) Section 305, subdivision K, provides as follows, in part:

> "Every registrant found by a selective service local board * * * * to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, shall be deferred from training and service in the land and naval forces so long as he remains so engaged and until such time as a satisfactory replacement can be obtained * * * *."

That on or about July 22, 1944, said Local Board No. 144, in classifying Homer Sheldon Green in Class II-C, found that said registrant was "necessary to and regularly engaged in an agricultural occupation or endeavor

essential to the war effort"; that in utter disregard of the express requirement of the said Tydings amendment, that any registrant found to be so engaged shall be deferred from training and service "so long as he remains so engaged and until such time as a satisfactory replacement can be obtained," the said Local Board No. 144, on or about December 21, 1944, without any advance notice of any nature whatsoever given either to your petitioner Sisquoc Ranch Company or Homer Sheldon Green, and without receiving any new evidence whatsoever as to whether or not said registrant remained engaged in an agricultural occupation or [7] endeavor essential to the war effort, or as to whether or not a satisfactory or any replacement could be obtained for said registrant, and without considering any new evidence whatever, and without giving Homer Sheldon Green any hearing whatever, either before or after said date, and without giving your petitioner any hearing or opportunity for a hearing at any time, arbitrarily, capriciously and in violation of the Selective Training and Service Act, as amended particularly by the aforesaid Tydings Amendment, and in violation of the rights of Homer Sheldon Green and your petitioner under the Constitution of the United States and, in particular, under the Fifth Amendment thereof, classified Homer Sheldon Green into Class I-A, thereby making said registrant immediately eligible for service in the Armed Forces of the United States.

XIV.

That your petitioner thereupon duly appealed said classification to the appropriate Appeal Board and Agency, and that said Appeal Board, acting on said appeal, with-

[FEC]

out a dissenting vote continued Homer Sheldon Green in

Class I-A; that your petitioner Sisquoc Ranch Company and Homer Sheldon Green were advised of such action by said Appeal Board through a Classification Advice

5 [FEC]

dated February 27, 1944; that subsequently on March 3, 1945, your petitioner Sisquoc Ranch Company, by letter, requested said Local Board No. 144, to reclassify Homer Sheldon Green into Class 2-C; that a copy of said letter is attached hereto, marked Exhibit C, and made a part of this petition.

XV.

That on March 6. 1945, Fred J. Goble, Government Appeal Agent, wrote a letter to Colonel K. H. Leitch, State Director of Selective Service, Plaza Building, Sacramento 14, California, as follows:

> Dear Sir: Subject: Homer Sheldon Green, Order 12901
>
> "The Board of Appeal of Santa Barbara County [8] classified Homer Sheldon Green, Order No. 12901, in Class I-A on January 31, 1945. He is engaged in agriculture and is employed by the Sisquoc Ranch Company.
>
> "I deem it to be in the national interest and necessary to avoid an injustice that you consider his claim for deferment and request the Board of Appeal to reconsider its determination or appeal to the President.
>
> "I therefore recommend that you either request the Board of Appeal of Santa Barbara County to reconsider its determination or appeal to the President.
>
> "In accordance with Section 627.61 of the Selective Service Act I request that Local Board 144 for-

ward the registrant's file to you for your consideration."

That under date of March 16, 1945, Lieutenant Commander J. P. Puffinbarger, USNR for the State Director, wrote a letter to Fred J. Goble, in answer to the aforesaid letter, denying the request made therein.

XVI.

That on or about the 17th day of March, 1945, Homer Sheldon Green received an induction order from said Local Board No. 144, informing him that he had been selected for training and service in the Land or Naval Forces of the United States, and directing him to report to said Local Board at Veterans Memorial Building, Pine and Tunnell Streets, Santa Maria, California, on the 30th day of March, 1945; that said order stated that said Local Board No. 144 would furnish the said Homer Sheldon Green transportation to an Induction Station, and that he would be there examined and, if accepted for training and service, would then be inducted into [9] the Land or Navy Forces; that said Homer Sheldon Green did report in the manner and at the time as requested in the said order, and was thereafter, on the said 30th day of March, 1945, transported by the said Local Board No. 144 to the City of Los Angeles, California, and delivered to the Armed Forces Induction Station, at the Pacific Electric Building, 610 South Main Street, in the said City of Los Angeles, and was there given a physical examination; that on the 31st day of March, 1945, the said Homer Sheldon Green was given an order signed by Captain

[FEC]

Wyman W. Croy, Assistant Induction Officers, and dated March 31, 1945, advising said Homer Sheldon Green

that he had been found acceptable for service in the Armed Forces of the United States pending result of his blood test, and ordering him to report on April 6, 1945, at not later than 7:45 A. M., to Room 390, Pacific Electric Building, 610 South Main Street, at which time he was to be prepared to leave for the Reception Center, Fort MacArthur, California.

XVII.

That under date of April 5, 1945, Robert B. Hollister, Chairman of the United States Department of Agriculture, War Board for Santa Barbara County, California, wrote a letter to said Local Board No. 144 again strongly recommending continued deferment of the said Homer Sheldon Green; that the said letter reads in part as follows:

> "WB Form No. 26 Revised. Nature of duties now being performed by registrant: Assistant Superintendent of ranch in full charge when Superintendent is absent for several days in upper ranch working cattle. As electric power is not available he has responsibility of servicing gas engines, supplying irrigating water from four wells equipped with heavy duty pump. He is a skilled mechanic and operator of tractor and bulldozer for grading and [10] leveling of land. He repairs and remodels ranch buildings and housing units. Present duties include feed and rationing of 100 head of beef steers now in feedpens.
>
> "This registrant is a steady and dependable worker. He is a trained man in agriculture, including livestock. The Farm Labor Office at Santa Maria states that they have no replacement available.

"Action of County War Board

"The Santa Barbara County USDA War Board has investigated this registrant and finds that he is continuing to be a very essential man in agriculture. The ranch which is the largest in Santa Barbara County, is inadequately manned at the present time. They are one of the largest beef producer ranches in the county. Among one of the important crops produced annually is 2500 tons of sugar-beets as well as beans and vegetables. We therefore strongly recommend continued deferment."

That on April 5, 1945, your petitioner Sisquoc Ranch Company delivered the above quoted letter of the United States Department of Agriculture War Board to the said Local Board No. 144, requesting said Local Board to reconsider its action in classifying Homer Sheldon Green in Class I-A and requesting said Local Board No. 144 to place the said Homer Sheldon Green in Class II-C, and furthermore requesting said Local Board to revoke the aforesaid induction order; that the said Local Board has failed to act in any manner or at all on the aforesaid letter of the Department of Agriculture War Board or to grant any of the requests made by your petitioner on April 5, 1945. [11]

XVIII.

That as required by the order of March 31, 1945, issued by Captain Wyman W. Croy referred to in paragraph XVI above, the said Homer Sheldon Green did report at the time and place required and was thereafter wrongfully and illegally inducted into the Armed Forces of the United States.

XIX.

That the aforesaid classification of Homer Sheldon Green into Class I-A on or about December 21, 1944, the said action of the Appeal Board, the said induction order, the failure of the said Local Board No. 144 to act on your petitioner's letter of March 3, 1945, or on its requests of April 5, 1945, the induction of Homer Sheldon Green into the Armed Forces of the United States, the present detention, confinement, restraint and custody of Homer Sheldon Green by Colonel W. W. Hicks, as aforesaid, and each of such acts, were arbitrary, capricious, unlawful, null and void, illegal, without any authority in law and in violation of the rights of Homer Sheldon Green and your petitioner Sisquoc Ranch Company, under the Constitution of the United States and, in particular, under the Fifth Amendment thereof, in that:

1. The said reclassification of said Homer Sheldon Green from Class II-C to Class I-A, and the said induction order were in violation of the Tydings Amendment to the Selective Training and Service Act (Title 50 App. U. S. C. A. Sec. 305, Subd. K).

2. The said reclassification of Homer Sheldon Green from Class II-C to Class I-A and the said induction order were not founded on substantial or any evidence whatever.

3. Your petitioner was given no hearing or opportunity for hearing by Local Board No. 144 on said reclassification from Class II-C to Class I-A [12] at any time or at all.

4. Homer Sheldon Green was given no hearing by said Local Board No. 144 on said reclassification from Class II-C to Class I-A, at any time or at all

5. On the basis of all the evidence submitted to said Local Board No. 144, prior to the wrongful and unlawful induction of said Homer Sheldon Green into the Armed Forces of the United States, as aforesaid ,the said Local Board should have classified the said Homer Sheldon Green in Class II-C and should have revoked its aforesaid induction order.

XX.

That Homer Sheldon Green is as of the time and date of the filing of this petition, and has from the date of his induction been, wrongfully restrained of his liberty and held in wrongful custody by the Armed Forces of the United States at Fort MacArthur, San Pedro, California, and within this District; that Colonel W. W. Hicks is now the Commanding Officer at said Fort MacArthur, and as such wrongfully holds the said Homer Sheldon Green in custody; that the said Homer Sheldon Green was, as of the date of the filing of this petition, and has since he was inducted been, restrained and deprived of his liberty exclusively under and by color of the authority of the United States.

Wherefore, your petitioner prays:

That a writ of Habeas Corpus issue from this Honorable Court directed to Colonel W. W. Hicks, Commanding Officer at Fort MacArthur, aforesaid, and whomsoever may hold Homer Sheldon Green in custody, commanding him or them to have the body of Homer Sheldon Green before the District Court of the United States for the Southern District of California, Central Division, Federal Building, Los Angeles, California, on the 16 day [J. F. T. O'Connor, Judge.] eleven o'clock A. M. of April, [13] 1945, at ~~the opening of Court~~ on that day,

or at such other time as in such writ shall be specified, for the purpose of inquiring into the cause of the restraint and detention of Homer Sheldon Green, and to do and abide such order as the Court may make in the premises.

SISQUOC RANCH COMPANY
By R. E. EASTON
Petitioner

OVERTON, LYMAN, PLUMB, PRINCE & VERMILLE,
Attorneys for Petitioner.

[Verified.] [14]

[EXHIBIT "A".]

ADDITIONAL INFORMATION ON CLAIM FOR DEFERRED CLASSIFICATION

Made Oct. 8, 1943

BY PERSON OTHER THAN REGISTRANT

Sisquoc Ranch Company hereby claims deferred classification for Homer Sheldon Green – Order No. 12901-2C, based on the following facts:

(Local Board No. 144, Santa Barbara County, Santa Maria, California)

Sisquoc Ranch Company, a corporation, desires to submit the following additional information in support of claim for deferment of above deferee.

Said Homer Sheldon Green has not only worked on farms and ranches over a period of years, but has also been employed by a contractor in construction work.

Owing to the extreme shortage of man power, Sisquoc Ranch Company has been obliged to postpone maintenance of springs, water supply lines, corrals, loading chutes, fencing, feed lot troughs and equipment. The lack of maintenance has reached an acute stage. Homer Sheldon Green has been trained to meet the requirements of the work vitally necessary at this time.

As a side issue, he is qualified to greatly improve the ranch supply of poultry and eggs.

The above will supplement the request of October 8, 1943, for deferment of Homer Sheldon Green for a period of one year. My relationship or association with the named registrant is nil. I, Robert E. Easton, do solemnly swear (or affirm) that the above facts are true.

R. E. Easton, Secretary
(Signature of claimant)
Sisquoc Ranch Company
(Address of claimant)
P.O. Box 459
Santa Maria, California

Subscribed and sworn to before me this 26 day of October, 1943. [15]

.....
(Signature of official administering oath)

.....
(Official designation of official administering oath)

(See other side for Instructions)

D.S.S. Form 42 16-18393-1
(Revised 4-13-42) [16]

Instructions for use of Claim for Deferred Classification by Persons Other than Registrant.

Any person desiring to make claim for deferred classification on behalf of a registrant must file a claim with the registrant's local board within the time allowed for the registrant to return his questionnaire.

All claims for deferred classification for a registrant must be made by sworn affidavit as shown on the reverse side of this page.

Any person so claiming that the registrant should be deferred shall be entitled to present evidence in support of his claim. Such evidence should be included in or attached to this form, and may include any documents, affidavits, or depositions supporting the claim. The affidavits or depositions shall be as concise and brief as possible.

The oath required by this form may be administered by:

1. Any civil officer authorized to administer oaths generally.
2. Any commissioned officer of the land or naval forces assigned for duty with the Selective Service System.
3. Any member or clerk of a local board or board of appeal.
4. Any Government appeal agent or associate Government appeal agent.
5. Any member or associate member of any advisory board for registrants.
6. Any postmaster, acting postmaster, or assistant postmaster.

No fee shall be charged by any person for administering the oath required on this form.

D.S.S. Form 42 16-18393-1

(Revised 4-13-42) U. S. Government Printing Office [17]

[EXHIBIT "B".]

Budget Bureau
No. 33-R001
Approval Expires
9-30-43

SELECTIVE SERVICE SYSTEM

AFFIDAVIT – OCCUPATIONAL CLASSIFICATION (GENERAL)

(This form is provided for use in activities where Affidavit-Occupational Classification (Industrial), Form 42A, is not applicable)

Name Homer Sheldon Green

Selective Service Order No. 12901--C Age 20

Local Board 144 Santa Barbara Santa Maria California
(Number) (County) (City) (State)

Under date of January 10, 1944, above Homer Sheldon Green was classified in Class 2-C until April 4, 1944.

Sisquoc Ranch Company, a corporation, supplementing claims for deferment of the above applicant, dated October 8, 1943, and October 26, 1943, desires to submit the following, as shown on the attached letter sheets, numbered and initialed, which are made a part of this affidavit.

I, R. E. Easton, do solemnly swear (or affirm) that the foregoing and attached statements are true to the best of my knowledge and belief.

R. E. E. Secretary of
(Signature)
SISQUOC RANCH COMPANY
P.O. Box 459, Santa Maria, Calif.
(Address)

Subscribed and sworn to before me this 30th day of March 1944

Helen Poole

.....

(Signature of official administering oath)

Clerk of Board

(Official designation of official administering oath)

(See other side for instructions)

Form 42 (Revised 9-15-42) 16-30298-3 [18]

AFFIDAVIT – OCCUPATIONAL CLASSIFICATION (GENERAL)

(This form is provided for use in activities where Affidavit – Occupational Classification (Industrial), Form 42A, is not applicable)

This form is to be filled out by an employer or any other person who has knowledge of the registrant's eligibility for Class II deferment as a necessary man in his civilian occupation or activity.

Evidence submitted to the local board may be included in or attached to this form and may include any documents, affidavits, or other information.

If the registrant is deferred, the employer must notify the local board promptly of any change in his job status, or if his employment is terminated.

The oath required by this form may be administered by any civil officer authorized to administer oaths generally, any commissioned officer of the land or naval forces assigned for duty with the Selective Service System, any member or clerk of a local board or board of

appeal, any Government appeal agent or associate Government appeal agent, any member or associate of an advisory board for registrants, any postmaster, acting postmaster, or assistant postmaster.

No fee shall be charged by any person for administering the oath required on this form.

16-30298-1 [19]

Sisquoc Ranch Company is the owner and operator of 41,508 acres of land, consisting of Sisquoc Grant and adjacent government lands, extending over approximately thirty miles of the Sisquoc River, including 2705 acres of the Tinaquaic Grant in Foxen Canyon.

With three tenants, 2100 acres are under cultivation for barley, oats, beans, sugar beets, lettuce and cauliflower. Included in this acreage, Sisquoc Ranch Company farms on its own account approximately 300 acres for hay and, until this present crop season, 100 acres of irrigated alfalfa of which area one-half is being rotated to another crop this season.

For the irrigation of sugar beets, vegetables and alfalfa, the surface flow of the Sisquoc River is available until the month of July. For the summer and fall months, water for irrigation must be supplied by pumping from four wells. As electric power is not available, gas engine power must be used.

Sisquoc Ranch Company ranges livestock over the entire area, including, under permit, a considerable area of the Los Padres Forest. Approximately 1,000 head of beef are marketed annually, partly from the range, but mostly from feed pens. Beef is finished by the use of barley and alfalfa hay and rolled barley produced and

rolled on the ranch, together with cottonseed cake purchased.

Besides the ranch headquarters, additional headquar-

1.

ters [20] are maintained in two locations, one known as the Tunnell House, 13 miles Southeast along the Sisquoc River and another at the Sisquoc Mine, approximately 8 miles South of the ranch headquarters.

For the season of 1943, 800 calves were marked at these locations.

All fencing, supplying of irrigating water, including the maintenance of pumping plants, springs and troughs for livestock and general maintenance are undertaken by Sisquoc Ranch Company.

The present employees of the ranch are as follows:

Kenneth L. Winsor,	Superintendent; age 37; classification 2-C, Order No. 819, Local Board 171, Orange Co., Newport Beach; employment began Dec. 1, 1942.
Montie Logan,	Rider; age 51; employment began May 4, 1943.
Alva W. Kooken,	Rider; age 44; employment began Oct. 1, 1943.
Alva W. Kooken,	Rider: age 44; employment began Oct. 1, 1943.
Theodore Delmo Muscio,	Assistant rider and general ranch worker; age 37; classification 2-C, Order No. 1916, Local Board 144, Santa Barbara Co., Santa Maria; employment began Feb. 10, 1944.

Homer Sheldon Green,	Sub-foreman at Ranch Headquarters during absence of superintendent, tractor driver and gas engine man; age 20; employment began October 15, 1943.
Robert Garcia,	Chore boy; age 18; employment began Mar. 13, 1944.

Said Homer Sheldon Green, by experience and adaptability, is qualified to take charge of operations at headquarters during the necessary absence of the superintendent for several days at a time at the outlying parts of the ranch. He will be in charge of beef feeding, the operation of gas engines and the operation of tractors on the crop [21]

2.

land.

He has worked as a farm hand over a period of four years, having graduated from the Santa Ynez Union High School.

It is now submitted that continued deferment be granted in the case of Homer Sheldon Green, on the basis that he is a key man in agricultural operations, that he, by training, intelligence and experience, may be classified as a skilled man in agriculture, and that he can not be replaced.

Respectfully,

R. E. E.

Secretary SISQUOC RANCH COMPANY

rp 3 [22]

[EXHIBIT "C".]

James H. Bishop, President	
Frank Bishop, Vice-President	Address:
R. E. Easton, Secretary	Santa Maria, Cal.
John E. Porter	Kenneth Winsor
Edward P. Pfingst	~~George~~ ~~Begg~~
N. L. Tyler	Ranch Superintendent

1-15-42-2M

SISQUOC RANCH COMPANY

Cattle

Hay, Grain, Beans and Alfalfa

Sisquoc Ranch, Santa Barbara County, Cal.

Santa Maria, Cal.

March 3, 1945

Selective Service System
Local Board No. 144-91
Santa Barbara County 083
Santa Maria, California

Re: HOMER SHELDON GREEN, Order No. 12901, Under Jurisdiction Selective Service System, Local Board No. 144-91, Santa Barbara County 083, Santa Maria, California. Classified 2-C, July 22, 1944; Reclassified 1-A, Dec. 21, 1944. Appeal taken Jan. 2, 1945 through Santa Barbara County U. S. Department of Agriculture War Board; Appeal Denied by Appeal Board, Feb. 27, 1945.

Sirs:

Sisquoc Ranch Company is the owner and operator of 41,508 acres of land, consisting of the Sisquoc Grant of 35,000 acres and adjacent Government lands extending

over approximately 30 miles of the Sisquoc River watershed, and including 2,705 acres of the adjoining Tinaquaic Grant in Foxen Canyon.

With three tenants, 2,100 acres are under cultivation for barley or oats, and beans, with approximately 300 acres under irrigation for the production of sugar beets, cauliflower and/or potatoes. Included in this acreage, Sisquoc Ranch Company farms on its own account, approximately 300 acres for grain hay and alfalfa.

For the irrigated crops, the surface flow of the Sisquoc River is available until the month of June or July. For the summer [23] and fall months, water for irrigation must be supplied by pumping from wells. As electric power is not available, gas engine power must be employed. Sisquoc Ranch Company is responsible for the water supplied for irrigation.

Sisquoc Ranch Company ranges live stock over the entire area (excluding the farming land) together with a considerable range in the Los Padres National Forest, under Forest Reserve permit. [24]

Re: Homer Sheldon Green

March 3, 1945

Page 2

Besides the Ranch Headquarters, additional headquarters are maintained at two locations, one at the Tunnell House, thirteen miles Southeast along the Sisquoc River and another at the Sisquoc Mine, approximately eight miles South of the Ranch Headquarters. In the Seasons of 1943 and 1944, approximately 800 calves were marked at these locations.

All fencing, supply of irrigating water, including the maintenance of pumping plants, springs and troughs for live stock, and general maintenance of all roads, buildings and improvements is undertaken by Sisquoc Ranch Company.

Registrant, Homer Sheldon Green, a High School graduate, has been in the employ of Sisquoc Ranch Company continuously for a period of one year and five months, after prior mechanical and agricultural experience.

Said registrant is not only a skilled gas engine man, truck and automobile mechanic, but also a tractor and bulldozer operator. He may be classified as a TRAINED AND ESSENTIAL MAN IN AGRICULTURE, having charge of the proper rationing to pen fed beef now under his supervision at the Ranch. He operates the steam and gas engine plants necessary for the milling of barley for beef production.

The services of a mechanic are continually necessary, including care of the Delco electric generating plant furnishing light to the ranch buildings and barns as electric power is not available as hereinafter shown. Said registrant as Assistant Superintendent takes charge of operations at the Ranch Headquarters during the necessary absences of the Superintendent at other headquarters while working the cattle at the different ranch locations.

Besides the agricultural products above listed, Sisquoc [25] Ranch Company produces approximately 1,000 head of beef annually, partly from the range, but mostly from finishing beef pens. Beef cattle are finished by the use of rolled barley, produced and milled at the ranch, barley and alfalfa hay, together with cottonseed and [26]

Re: Homer Sheldon Green
March 3, 1945
Page 3

molasses purchased.

Attached statement from the Farm Labor Office, Agricultural Extension Service, Santa Maria, California, affirms that replacement of registrant is not possible. Under the Tydings' Amendment to the Selective Service Act, it is now submitted that said registrant is essential to the production of beef and other necessary foodstuffs and can not be replaced and that his deferment should be continued.

Attached statement from the electric power company, indicating that availability of electric power is indefinite, confirms the need of the services of the registrant to the end that the gas engine power for the pumping of water under his supervision be not curtailed.

Under date of January 22, 1945, statement attributed to Draft Director David Hershey reported that "Farmers under twenty-one will still be deferred if they come under the provisions of the Tydings' Amendment."

Under date of January 23, 1945, Sisquoc Ranch Company requested Santa Barbara County U. S. Department of Agriculture War Board to appeal the case of registrant, HOMER SHELDON GREEN, reclassified from 2-C to 1-A on December 21, 1944. It is now our information that Santa Barbara Appeal Board has retained said registrant in 1-A.

Sisquoc Ranch Company now submits that labor conditions have become even more acute, with the result that services of registrant, as Assistant Superintendent, are now more necessary to employer than heretofore; that said registrant clearly and manifestly is covered by the provisions of the Tydings' Amendment to the Selective Service Act; that, in view of the above newly developed facts, action of the Appeal Board should be reconsidered, on the [27] ground that said registrant is an ESSENTIAL AND NECESSARY MAN IN AGRICULTURE.

Re: Homer Sheldon Green

March 3, 1945

Page 4

On July 22, 1944, registrant, after appropriate procedure by appeal from 1-A Classification, was reclassified in 2-C. For the succeeding eight months, registrant has become more firmly established as an ESSENTIAL WORKER IN AGRICULTURE. Any change now from said determined 2-C Classification would appear inconsistent.

Attached statement from Farm Labor Office affirms that registrant can not be replaced. His loss will seriously impair productive operations.

Respectfully submitted,

SISQUOC RANCH COMPANY

R. E. Easton

R. E. Easton, Secretary

REE:rp [28]

Re: Homer Sheldon Green
March 3, 1945
Page 5

Supplemental:

The present employees of Sisquoc Ranch Company are as follows:

1. Kenneth L. Winsor, Age 38 yrs., Superintendent. Term of Employment, 2½ years.
2. Homer S. Green, Age 22 yrs., Assistant Superintendent, Term of Employment, 1 year, 5 months.
3. Edmund Yanez, Age Unknown, probably about 30 yrs.; Entered Employ, Sept. 15, 1944.
4. Archie C. Snodgrass, Age 49 yrs.; Entered Employ Oct. 21, 1944.
5. A. G. Webster, Age 17 yrs. (Alabama); entered Employ, Jan. 13, 1945.
6. Francis M. Hunt, Age 51 yrs. (Arizona); Entered Employ, Feb. 1945.
7. Jack McCarthy, Age 32 yrs.; Entered Employ, Feb. 1945.
8. Newton E. Rutherford, Age 37 yrs. (Texas); Entered Employ March 2, 1945; Physical Impairment; Chore Man.

Nos. 3 and 4—Range riders and cattle workers; at present for several days at Tunnell House, 13 miles from Ranch Headquarters.

Nos. 5, 6, 7 and 8—"Floating" labor, which is uncertain and apt to "quit" at any time without notice to employer.

Between December 12, 1944 and January 13, 1945, number of employees besides Superintendent and Assistant Superintendent, was reduced to two in number.

REE:rp [29]

Copy

COOPERATIVE EXTENSION WORK in
AGRICULTURE and HOME ECONOMICS
STATE OF CALIFORNIA

University of California and
U. S. Dept. Of Agriculture
Cooperating

EXTENSION SERVICE
Santa Maria, California
March 1, 1945

Sisquoc Ranch Company
P.O. Box 459
Santa Maria, California

Re: Homer Sheldon Green

Attention: R. E. Easton, Secretary

Dear Mr. Easton:

At this time I regret to inform you that we have nobody on our list who could take over the work which you describe as being done by Mr. Green.

About the only ones coming to our office these days are 4F's, looking for common labor jobs.

Very truly,

ERNEST R. HENSLEY (Signed)
Emergency Farm Labor Field
Assistant [30]

Copy

PACIFIC GAS AND ELECTRIC COMPANY
SANTA MARIA, CALIFORNIA

Santa Maria, California
March 2, 1945

Mr. R. E. Easton
Santa Maria, California

Dear Mr. Easton:

Some weeks ago we negotiated with you about the possibility of extending our distribution system to make electric service available to you on the Sisquoc Ranch.

Please be advised that at the time this and similar extensions were surveyed the problem before us was twofold: first, obtaining authorization from the California Railroad Commission for the liberalization of our extension rule, and second, obtaining authorization from the War Production Board to use the required line materials.

The first has been accomplished; although our application to the War Production Board has been filed, the Board has not as yet given us blanket authorization to use material to the extent necessary.

We are therefore unable at this time to supply anything in the way of information as to when the extension may be approved. It is, however, our opinion that approval will not be received in the near future.

We assure you of our continued interest and cooperation.

Very truly yours,
GEO. V. FOOTMAN (Signed)
District Manager [31]

[Endorsed]: Filed Apr. 6, 1945.

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

Good cause appearing therefor, and upon reading the verified petition in the above matter on file herein, and due deliberation having been made thereon:

It Is Hereby Ordered that Colonel W. W. Hicks, Commanding Officer of Fort MacArthur, or whosoever is or are charged with the custody of Homer Sheldon Green, appear before this Court on the 16 day of April, 1945, at the hour of Eleven o'clock in the forenoon, of said day, to show cause, if any he or they have, why a writ of habeas corpus should not be issued herein, as prayed for;

And It Is Further Ordered that a copy of this Order be served on Colonel W. W. Hicks, Commanding Officer of Fort MacArthur, and also on such other person or persons, if any, who has or have Homer Sheldon Green in custody;

And It Is Further Ordered that the said Colonel W. W. Hicks, or whosoever has or have Homer Sheldon Green in custody, retain [32] the said Homer Sheldon Green in his or their custody and within the jurisdiction of this Court until its further order herein;

And It Is Further Ordered that copies of this Order to Show Cause, and the Petition herein, be served on the United States Attorney for the Southern District of California.

Dated at Los Angeles, California, this 6 day of April, 1945.

J. F. T. O'CONNOR
District Judge

[Endorsed]: Filed Apr. 6, 1945. [33]

[Title of District Court and Cause.]

RETURN TO ORDER TO SHOW CAUSE

Comes Now Max Roth, Respondent, and makes return to the order heretofore entered in this cause requiring Respondent to show cause why a Writ of Habeas Corpus should not issue herein:

Respondent avers that he is a Lt. Colonel, Infantry, Army of the United States, Commanding Reception Center and Induction Station, at Ft. MacArthur, California:

That on April 6, 1945, the said Homer Sheldon Green reported at Ft. MacArthur Armed Forces Induction Station pursuant to an Order directing him so to do issued by Local Board No. 144, Santa Barbara County, California, pursuant to the provisions of the Selective Service and Training Act and the regulations promulgated pursuant thereto, and took the oath for induction into the Army of the United States and was then and there duly inducted into the Army of the United States and assigned serial number 39743195: [34]

That said Homer Sheldon Green is not detained or restrained of his liberty except as set forth above, but that he is now a member of the Army of the United States and subject to the Articles of War and to the rules and regulations of the Army and to the orders of the officers of the Army of the United States, including this Respondent:

That Respondent has no information as to the steps and proceedings leading up to the classification and induction of the said Homer Sheldon Green except as set forth in the petition for Writ of Habeas Corpus filed herein, but Respondent is informed and believes that all proceedings concerning the classification of said Homer Sheldon Green,

the order to report for induction, and his said induction were carried on pursuant to and in accordance with the provisions of the Selective Service and Training Act of 1940 and the rules and regulations promulgated pursuant thereto;

Respondent avers that he is without knowledge or information sufficient to form a belief as to the truth of any of the allegations in the petition set forth except those herein specifically admitted or denied, and therefore Respondent denies each of said allegations.

Wherefore, Respondent says that the Writ of Habeas Corpus as herein prayed should be denied.

Dated: April 12, 1945.

MAX ROTH

Lt. Colonel, Infantry, Army of the United States, Commanding Reception Center and Induction Station, Ft. MacArthur, Calif.

[Verified.]

[Endorsed]: Filed Apr. 16, 1945. [36]

[Minutes: Monday, April 16, 1945]

Present: The Honorable J. F. T. O'Connor, District Judge.

This matter coming on for hearing on order to show cause, filed April 6, 1945, directed to Colonel W. Hicks, Commanding Officer of Fort MacArthur, or whomsoever is charged with the custody of Homer Sheldon Green, to show cause why a Writ of Habeas Corpus should not be issued; Messrs. Overton, Lyman, Plumb, Prince, and Ver-

mille by Attorney Vermille appearing as counsel for the petitioner; Robert E. Wright, Assistant U. S. Attorney, appearing as counsel for the Government; and H. A. Dewing, Court Reporter, being present and reporting the proceedings:

Attorney Vermille moves to amend the petition. It is so ordered and amendment is made to pages 2 and 7. Attorney Wright argues in opposition.

It is ordered that the matter be, and it hereby is, continued to 2 P. M. At 2:14 P. M. court reconvenes and all being present as before, Attorney Wright resumes argument to the Court. At 2:51 P. M. Attorney Vermille argues in reply. Attorney Wright argues further.

It is ordered that the matter be submitted, Attorney Wright to file written return to order, submitting same on briefs to be filed by April 23, 1945, and April 27, 1945. [37]

[Minutes: Thursday, May 31, 1945]

Present: The Honorable J. F. T. O'Connor, District Judge.

This matter having heretofore come before the Court for hearing on order to show cause, filed April 6, 1945, directed to Colonel W. Hicks, Commanding Officer of Fort MacArthur, etc., charged with the custody of Homer Sheldon Green to show cause why a Writ of Habeas Corpus should not be issued: The Court now causes its order to be filed, and, pursuant thereto, the prayer of the petition for said writ is denied. [38]

[Title of District Court and Cause.]

ORDER

Overton, Lyman, Plumb, Prince & Vermille, 733 Roosevelt Bldg., Los Angeles, Calif., Attorneys for Petitioner.

Charles H. Carr, U. S. Attorney, and Ronald Walker and Robert E. Wright, Assistant U. S. Attorneys, 600 Federal Building, Los Angeles 12, Calif., Attorneys for Respondent.

O'Connor, J. F. T., Judge.

* * * * *

The petition for a Writ of Habeas Corpus was filed on April 6, 1945 in the above entitled court. The court heard arguments of plaintiff and defendant, and also examined exhaustive briefs filed by both parties.

The court, having considered the same, denies the prayer of the petitioner.

Colonel Max W. Sullivan, Commanding Officer, Fort Lewis, Washington et al vs. John H. Swatzka, May 1, 1945 (9th) ..... F. (2d) .....;
Bagley vs. U. S., 144 F. (2d) 788;
Local Draft Board vs. Connors, (9) 124 F. (2d) 388;
Chin Yow vs. U. S., 208 U. S. 8;
Crutchfield vs. U. S., 142 F. (2d) 170;
Nelson B. Cramer vs. Colonel Jesse G. France, ... F. (2) ....) (March 29, 1945).

Dated at Los Angeles, California, this 31st day of May, 1945.

J. F. T. O'CONNOR
Judge

[Endorsed]: Filed May 31, 1945. [39]

[Minutes: Friday, June 1, 1945]

Present: The Honorable J. F. T. O'Connor, District Judge.

On motion of L. K. Vermille, Esq., appearing as counsel for the petitioner, and Robert E. Wright, Esq., Asst. U. S. Attorney, appearing for the Respondent, interposing no objections thereto, it is by the Court ordered that the petitioner herein be granted leave to file an amendment to his petition and that hearing thereon be set for Tuesday, June 5, 1945, at 10 A. M. It is further ordered that restraining order remain in effect until noon of that day. [40]

[Title of District Court and Cause.]

AMENDMENT TO PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable the Judges of the United States District Court, Southern District of California, Central Division:

Leave of Court having been first duly obtained, the petition of Sisquoc Ranch Company, a corporation, in the above entitled action, is hereby amended as follows:

I.

By striking out paragraph XIII from said petition and substituting in lieu thereof the following:

"XIII.

"That the Tydings Amendment to the Selective Training and Service Act, 50 U. S. C. A. (Appendix) Section 305, subdivision K, provides as follows, in part:

'Every registrant found by a selective service local board * * * to be necessary to and regularly engaged in an agricultural occupation or [41] endeavor essential to the war effort, shall be deferred from training and service in the land and naval forces so long as he remains so engaged and until such time as a satisfactory replacement can be obtained * * *.'

That said Local Board No. 144, in classifying Homer Sheldon Green in Class II-C on or about July 22, 1944, found that said registrant was 'necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort'; that in utter disregard of the express requirement of the said Tydings Amendment, that any registrant found to be so engaged shall be deferred from training and service 'so long as he remains so engaged and until such time as a satisfactory replacement can be obtained,' the said Local Board No. 144, on or about December 19, 1944, without any notice of any nature whatsoever given either to your petitioner Sisquoc Ranch Company or Homer Sheldon Green, and acting without any evidence whatsoever either that Homer Sheldon Green did not remain so engaged in an agricultural occupation or endeavor essential to the war effort subsequent to his said classification into Class II-C, or that a satisfactory or any replacement could be obtained for him, and without giving Homer Sheldon Green any hearing whatsoever either before or after said date, and without giving your petitioner any hearing or opportunity for a hearing at any time, reclassified Homer Sheldon Green from Class II-C to Class I-A, thereby making said registrant immediately eligible for service in the Armed Forceds of the United States."

II.

By striking out paragraph XIV from said petition and substituting in lieu thereof the following:

"XIV.

"That on or about December 23, 1944, your petitioner and Homer Sheldon Green received notice of the aforesaid re- [42] classification action by the said Local Board; that on the same date, after receiving said notice of reclassification, your petitioner wrote a letter to said Local Board No. 144, giving notice of appeal from said reclassification and requesting a personal appearance before said Local Board.

"That on or about January 2, 1945, your petitioner wrote another letter to the said Local Board regarding registrant Homer Sheldon Green, the body of which letter reads as follows:

> 'The above registrant has been in the employ of Sisquoc Ranch Company for over one year and is fully conversant with the fixed plants, consisting of gas engine units, as well as the tractor and bulldozer equipment, of which he is a skilled operator.
>
> 'He is now to be placed in charge of cattle feeding operations during the winter months involving the proper rationing to the beef cattle with which he is familiar.
>
> 'He is a man of exceptional mechanical ability.
>
> 'It is now submitted that said registrant is a very necessary man in agriculture and can not be replaced. His loss will seriously affect the productive capacity of the Sisquoc Ranch Company.'

That the said letter of January 2, 1945, was received by said Local Board on or about January 4, 1945, and was thereupon filed in, and made a part of, the records of

said Local Board on Homer Sheldon Green; that on or about January 25, 1945, the said Local Board, without any notice to your petitioner, and without giving your petitioner any opportunity for a personal appearance or hearing before said Local Board despite your petitioner's said written request of December 23, 1944, forwarded its records on Homer Sheldon Green to the Appeal Board. [43]

"That on or about January 30, 1945, the said Appeal Board, without a dissenting vote, affirmed the action of the said Local Board in reclassifying Homer Sheldon Green from Class II-C to Class I-A and classified Homer Sheldon Green in Class I-A, despite the fact that there was no evidence whatsoever in said Local Board record either that Homer Sheldon Green did not remain engaged in an agricultural occupation or endeavor essential to the war effort subsequent to his classification to Class II-C on or about July 19, 1944, or that a satisfactory, or any, replacement for him could be obtained, and despite the fact that said Appeal Board knew and there was substantial and uncontradicted evidence in the said record, that the said Homer Sheldon Green did remain so engaged and in fact could not be replaced; that your petitioner Sisquoc Ranch Company and Homer Sheldon Green were advised of such action by said Appeal Board through a Classification Advice dated February 27, 1945; that subsequently on March 3, 1945, your petitioner Sisquoc Ranch Company, by letter, requested said Local Board No. 144, to reclassify Homer Sheldon Green into Class II-C; that a copy of said letter is attached hereto, marked Exhibit C, and made a part of this petition."

III.

By striking out paragraph XIX from said petition and substituting in lieu thereof the following:

"XIX.

"That the aforesaid reclassification of Homer Sheldon Green from Class II-C into Class I-A on or about December 19, 1944, the said action of the said Appeal Board on or about January 31, 1945, in affirming the said reclassification action of said Local Board and in classifying Homer Sheldon Green in Class I-A, the said induction order, the said induction of Homer Sheldon Green into the Armed Forces of the United States, and the present detention, confinement, restrtaint and custody of Homer Sheldon [44] Green by Colonel W. W. Hicks and whomsoever else may hold Homer Sheldon Green in custody, as aforesaid, and each of said acts, were and are arbitrary, capricious, unlawful, illegal, null and void, without any authority at law, and in violation of the rights of Homer Sheldon Green and your petitioner under the Selective Training and Service Act, and in particular the Tydings Amendment thereto (Title 50 App. U. S. C. A. Sec. 305, Subd. K), and in violation of the rights of Homer Sheldon Green and your petitioner under the Constitution of the United States, and in particular under the Fifth Amendment thereto, in that:

"(1) The said Local Board, on or about December 19, 1944, reclassified Homer Sheldon Green from Class II-C to Class I-A without giving any notice of any kind whatsoever either to your petitioner or Homer Sheldon Green.

"(2) The said reclassification action of said Local Board was not supported by any evidence whatsoever either that Homer Sheldon Green did not remain engaged in an agricultural occupation or endeavor essential to the war effort subsequent to his classification in Class II-C on or about July 19, 1944,

or that a satisfactory, or any, replacement for him could be obtained.

"(3) The said Local Board gave your petitioner no hearing on the said reclassification action by the said Local Board of Homer Sheldon Green from Class II-C to Class I-A, even though a written request therefor had been promptly made.

"(4) The said Appeal Board affirmed the action of the said Local Board in reclassifying Homer Sheldon Green from Class II-C to Class I-A and classified Homer Sheldon Green in Class I-A despite the fact that there was no evidence in said Local Board record before it either that Homer Sheldon Green did not remain engaged in an agricultural [45] occupation or endeavor essential to the war effort subsequent to his classification in Class II-C on July 19, 1944, or that a satisfactory, or any, replacement for him could be obtained, and despite the fact that said Appeal Board knew and there was substantial and uncontradicted evidence in the said record affirmatively showing that the said Homer Sheldon Green did remain so engaged and in fact could not be replaced."

OVERTON, LYMAN, PLUMB,
PRINCE & VERMILLE

By L. K. Vermille

Attorneys for Petitioner

[Verified.]

[Endorsed]: Filed Jun. 5, 1945. [47]

[Minutes: Tuesday, June 5, 1945]

Present: The Honorable J. F. T. O'Connor, District Judge.

This matter coming on for hearing on motion of petitioner for leave to file an amendment to petition for Writ of Habeas Corpus, said motion having been filed on June 4, 1945; L. K. Vermille and Carl J. Schuck, Esqs., appearing for the petitioner; Robert E. Wright, Esq., Asst. U. S. Attorney, appearing for the Respondent; C. W. McClain, Court Reporter, being present and reporting the proceedings during the latter part only:

Attorney Schuck argues in support of motion to file amendment to the petition and moves that the petitioner be allowed to amend his petition as indicated in the amendment to the petition for Writ of Habeas Corpus. The amendment is allowed to be filed, the Government not objecting thereto as to the filing. Attorney Schuck now argues on the petition as amended. Attorney Wright argues in opposition. The Court makes the following statement:

Let the record show that the amendment to the petition for Writ of Habeas Corpus has been considered by the Court and that the Government has consented to the filing of the amendment to the petition for a Writ of Habeas Corpus and that the Court allowed the amendment to be filed. It is the opinion of the Court that the petitioner, the employer of the registrant, has not claimed exemption and was not entitled to notice, and that the contractual relation of the Ranch Company and the registrant, Homer Sheldon Green, did not supersede the general welfare of the nation and did not give the

Ranch Company, the employer, a standing contended for by the petitioner. The Court sees no reason why, in view of the statement of the Government that [48] there is no dispute with reference to the facts stated in the petition and amended petition, there should be any necessity for a hearing. It is, therefore, assumed that all of the facts stated in the amendment to the petition and the petition for Habeas Corpus are conceded by the Government, the same as if a hearing were held. The issuance of a writ will, therefore, be denied and exception allowed to the petitioner, the Sisquoc Ranch Co. in its own behalf and in behalf of Homer Sheldon Green, as alleged in the petition for a Writ of Habeas Corpus.

Thereupon, Carl J. Schuck, Esq., appearing for the petitioner, requests the Court to keep the restraining order in force and effect against the removal of Homer Sheldon Green from the jurisdiction of this Court and to keep the restraining order in force until such time as the final order of this Court is signed and until such time as counsel for the petitioner has received notice of the entry of that order, as counsel for the petitioner intends to appeal from the final order in this case, and asks that the restraining order remain in effect until such time as petitioner has filed notice of appeal.

Thereupon, at the hour of 11:40 A. M. the Court signs order that the petition for a Writ of Habeas Corpus be denied and that the order enjoining Colonel W. W. Hicks, or such other or others, to retain said Homer Sheldon Green in his or their custody and within the jurisdiction of this Court, be dissolved, which order is filed and entered in Civil Order Book 33, page 191.

At 11:45 A. M. notice of appeal is filed and copy given to counsel for the Government. [49]

[Title of District Court and Cause.]

Before the Honorable J. F. T. O'Connor

HEARING ON AMENDMENT OF PETITIONER TO PETITION FOR WRIT OF HABEAS CORPUS

Appearances:

For the Petitioner: L. K. Vermille, Esq. and Carl J. Schuck, Esq., 733 Roosevelt Building, Los Angeles, California.

For-the Government: Charles H. Carr, Esq., United States Attorney; by Robert E. Wright, Esq., Assistant United States Attorney. [51]

Los Angeles, California, Thursday, June 5, 1945.

10:00 A. M.

The Court: Let the record show that the amendment to the petition for the Writ of Habeas Corpus has been considered by the court, and the government has consented to the filing of the amended petition for a Writ of Habeas Corpus, and the court allows the amendment.

The court has stated before that in these matters the courts are liberal in permitting amendments, so that all of the issues may be determined by the court. The government made the further statement that a hearing on the Writ of Habeas Corpus could add nothing to the rather carefully prepared petition and affidavit attached thereto, and the record attached thereto, and the additional matters that are presented in the amendment to the petition for Writ of Habeas Corpus.

It will be noted that the registrant, Homer Sheldon Green, has not himself made any application or request to the local board for a deferment, under the Tydings Amendment to the Selective Service Training and Service Act, (Appendix) Section 305, Subdivision K, which provides in part that, "Every registrant found by a Selective Service Local Board to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, shall be deferred from training and service in the land and naval forces so long as he remains so engaged and until such time [52] as a satisfactory replacement can be obtained."

The record further shows that the local draft board, No. 144, in classifying Homer Sheldon Green in Class II-C on or about July 22, 1944, found that registrant was both "necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort"; that thereafter the local board reclassified Green in Class I-A, and the registrant immediately became eligible for service in the armed forces of the United States; that the registrant was notified of his classification; that his employer, the Ranch Company and petitioner, requested a hearing under the reclassification, which was denied by the local board; that an appeal was taken by the employer of Green, the Ranch Company, and, by unanimous vote of the Appeal Board, the classification in which Green was placed by the local board was affirmed.

It is the opinion of the court that petitioner, the employer of the registrant, was not entitled to notice, and that the contractual relation of the Ranch Company and the registrant, Green, did not supersede the general welfare of the Nation, and did not give the Ranch Company, the employer, the standing contended for by the petitioner.

The court sees no reason why, in view of the statement of the Government, that there is no dispute with reference to the facts stated in the petition and the amended petition, there should be any necessity for a hearing. It will there- [53] fore be assumed that all of the facts stated in the petition and the amendment to the petition for the Writ of Habeas Corpus are conceded by the Government, the same as if a hearing were held. Issuance of the Writ will therefore be denied, and an exception will be allowed to the petitioner, the Ranch Company, the corporation, in its own behalf, as stated in its petition, and on behalf of Homer Sheldon Green as alleged in its petition for a Writ of Habeas Corpus.

[Endorsed]: Filed Jul. 5, 1945. [54]

In the District Court of the United States in and for the Southern District of California

Central Division

No. 4369-O'C

In the Matter of the Petition of SISQUOC RANCH COMPANY, a corporation, on its own behalf, and on behalf of HOMER SHELDON GREEN, for a Writ of Habeas Corpus.

ORDER

Upon reading amended Petition for the issuance of a Writ of Habeas Corpus, and the papers and exhibits attached thereto, and after hearing L. K. Vermille, Esq., attorney for the relator in support thereof, and due deliberation having been had, it is

Ordered that the said Petition for a Writ of Habeas Corpus be, and the same hereby is denied; and

It Is Further Ordered that the Order heretofore entered in this cause and directed to "Colonel W. W. Hicks or whosoever has or have Homer Sheldon Green in custody", enjoining said Colonel W. W. Hicks or such other or others to retain said Homer Sheldon Green in his or their custody and within the jurisdiction of this Court, be and the same hereby is dissolved.

Dated this 5th day of June, 1945.

J. F. T. O'CONNOR
United States District Judge

Judgment entered Jun. 5, 1945. Docketed Jun 5, 1945. Book C. O. 33, Page 191. Edmund L. Smith, Clerk, by Francis E. Cross, Deputy.

[Endorsed]: Filed Jun. 5, 1945. [55]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Sisquoc Ranch Company, a corporation, petitioner in the above entitled action, on its own behalf and on behalf of Homer Sheldon Green, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Order entered in this action on the 5th day of June, 1945.

OVERTON, LYMAN, PLUMB, PRINCE & VERMILLE
By L. K. Vermille
Attorneys for Petitioner

[Endorsed]: Filed Jun. 5, 1945. [56]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD ON APPEAL

It Is Hereby Stipulated and Agreed by and between the parties hereto, through their respective attorneys of record, pursuant to Rule 75(f) of the Federal Rules of Civil Procedure, that the following parts of the record and proceedings be included in the record on appeal:

(1) Petition for Writ of Habeas Corpus;
(2) Order to Show Cause;
(3) Return to Order to Show Cause;
(4) Order dated May 31, 1945;
(5) Minute Order dated June 1, 1945, giving petitioner until June 5, 1945, within which to apply for leave to amend;
(6) Amendment to Petition for Writ of Habeas Corpus;
(7) Opinion rendered June 5, 1945;
(8) Order dated June 5, 1945; [57]
(9) Notice of Appeal filed June 5, 1945.

Dated this 29th day of June, 1945.

OVERTON, LYMAN, PLUMB, PRINCE & VERMILLE
By L. K. Vermille
Attorneys for Petitioner
CHARLES H. CARR
United States Attorney
RONALD WALKER and
ROBERT E. WRIGHT
Assistant U. S. Attorneys
By Robert E. Wright
Attorneys for Respondent

[Endorsed]: Filed Jun. 29, 1945. [58]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 58 inclusive contain full, true and correct copies of Petition for Writ of Habeas Corpus; Order to Show Cause; Return to Order to Show Cause; Minute Orders Entered April 16, 1945 and May 31, 1945; Order; Minute Order Entered June 1, 1945; Amendment to Petition for Writ of Habeas Corpus; Minute Order Entered June 5, 1945; Opinion Rendered June 5, 1945; Order filed and entered June 5, 1945; Notice of Appeal and Stipulation as to Record on Appeal which constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to $12.15 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 11 day of July, 1945.

[Seal] EDMUND L. SMITH,
Clerk.

By Theodore Hocke
Chief Deputy Clerk

[Endorsed]: No. 11096. United States Circuit Court of Appeals for the Ninth Circuit. Sisquoc Ranch Company, a Corporation, on its own behalf and on behalf of Homer Sheldon Green, Appellants, vs. Max Roth, Lt. Colonel, Infantry, Army of the United States, Appellee. Transcript of Record. Upon Appeal From the District Court of the United States for the Southern District of California, Central Division.

Filed July 12, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11096

SISQUOC RANCH COMPANY, a Corporation, on its own behalf and on behalf of HOMER SHELDON GREEN,

Appellant,

vs.

COL. W. W. HICKS, Commanding Officer of Fort MacArthur, and LT. COL. MAX ROTH, Commanding Officer of Reception Center and Induction Station, Fort MacArthur,

Appellees.

APPELLANT'S STATEMENT OF THE POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD FOR CONSIDERATION

Statement of the Points to Be Relied Upon

I.

That the District Court erred in denying the petition as amended in that the following facts alleged therein constitute sufficient ground for the granting of said petition: That the Local Board reclassified Homer Sheldon Green from Class II-C to Class I-A without giving any notice of any kind whatsoever either to Sisquoc Ranch Company or to Homer Sheldon Green.

II.

That the District Court erred in denying the petition as amended in that the following facts alleged therein con-

stitute sufficient ground for the granting of said pettion: That the reclassification action of the Local Board on or about December 19, 1944, was not supported by any evidence whatsoever either that Homer Sheldon Green did not remain engaged in an agricultural occupation or endeavor essential to the war effort subsequent to his classification in Class II-C on or about July 19, 1944, or that a satisfactory, or any, replacement for him could be obtained.

III.

That the District Court erred in denying the petition as amended in that the following facts alleged therein constitute sufficient ground for the granting of said petition: That the Local Board gave Sisquoc Ranch Company no hearing on the said reclassification action by the Local Board of Homer Sheldon Green from Class II-C to Class I-A, even though a written request therefor had been promptly made.

IV.

That the District Court erred in denying the petition as amended in that the following facts alleged therein constitute sufficient ground for the granting of said petition: That the Appeal Board affirmed the action of the Local Board in reclassifying Homer Sheldon Green from Class II-C to Class I-A and classified Homer Sheldon Green in Class I-A despite the fact that there was no evidence in the Local Board record before it either that Homer Sheldon Green did not remain in an agricultural occupation or endeavor essential to the war effort subsequent to his classification into Class II-C on July 19, 1944, or that a satisfactory, or any, replacement for him could be obtained, and despite the fact that the Appeal Board knew and there was substantial and uncontradicted evidence in

the record affirmatively showing that Homer Sheldon Green did remain so engaged and in fact could not be replaced.

V.

That the District Court erred in denying appellant's petition for a writ of habeas corpus, as amended.

VI.

That the District Court erred in dissolving the restraining order requiring Col. W. W. Hicks, or whosoever had Homer Sheldon Green in custody, to retain Homer Sheldon Green in custody and within the jurisdiction of the District Court.

Designation of Parts of Record for Consideration

I.

All parts of the record and proceedings specified in Stipulation as to Record on Appeal dated June 29, 1945.

II.

Stipulation as to Record on Appeal dated June 29, 1945.

Dated this 5th day of July, 1945.

OVERTON, LYMAN, PLUMB,
PRINCE & VERMILLE
By L. K. Vermille
Attorneys for Appellant Sisquoc Ranch Company

Received copy of the within Appellants' Statement, etc., this 5th day of July, 1945. Charles H. Carr, United States Attorney. RM.

[Endorsed]: Filed Jul. 12, 1945. Paul P. O'Brien, Clerk.

No. 11096

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SISQUOC RANCH COMPANY, a Corporation, on its own behalf and on behalf of Homer Sheldon Green,

Appellant,

vs.

MAX ROTH, Lt. Colonel, Infantry, Army of the United States,

Appellee.

APPELLANT'S OPENING BRIEF.

L. K. VERMILLE,
CARL J. SCHUCK,
OVERTON, LYMAN, PLUMB,
PRINCE & VERMILLE,
733 Roosevelt Building, Los Angeles 14,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR 5206.

TOPICAL INDEX.

PAGE

II.

III.

TABLE OF AUTHORITIES CITED.

CASES. PAGE

PAGE

MISCELLANEOUS.

STATUTES.

PAGE

No. 11096

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SISQUOC RANCH COMPANY, a Corporation, on its own behalf and on behalf of Homer Sheldon Green,

Appellant,

vs.

MAX ROTH, Lt. Colonel, Infantry, Army of the United States,

Appellee.

APPELLANT'S OPENING BRIEF.

This is an appeal by the Sisquoc Ranch Company, hereinafter referred to as "appellant", on its own behalf, and on behalf of Homer Sheldon Green, hereinafter referred to as "Green", from a final order of the United States District Court for the Southern District of California in a habeas corpus proceeding wherein the said District Court denied appellant's petition for writ of habeas corpus.

Jurisdiction.

The petition for writ of habeas corpus and amendment thereto alleges the illegal induction of Green into the armed forces of the United States in violation of the so-called Tydings Amendment regulating deferments for

agricultural workers [R. 2-30 and 36-41]. The United States District Court for the Southern District of California had jurisdiction under Title 28 U. S. C. A., Sections 451 and 452, and this court has appellate jurisdiction under Title 28 U. S. C. A., Section 463.

STATEMENT OF THE CASE.

A. The Petition for Writ of Habeas Corpus.

The petition [R. 2-30] and the amendment thereto [R. 36-41] in substance alleges: That appellant is a California corporation [R. 2] owning and operating a ranch of more than 41,000 acres of land situated in Santa Barbara County, devoted to agriculture, including the production of barley, oats, beans, sugar beets, cauliflower, potatoes, hay, grain, alfalfa and numerous other foodstuffs and agricultural commodities; that appellant also owns and ranges thereon a very large quantity of livestock [R. 4]; that Green was employed by appellant in October, 1943, and was continuously so employed until his induction into the armed forces of the United States [R. 4]; that at the time of his induction and for a long time prior thereto, Green was appellant's Assistant Superintendent and as such had complete charge of operations at ranch headquarters at all times during the absences of the Superintendent therefrom, and that due to the stress of war conditions and labor problems in agriculture, appellant was subjected to acute and critical labor shortages and that, aside from the Superintendent, Green was the only other permanent employee of appellant capable of exercising responsibility in connection with the ranch operations and that Green is a skilled agricultural worker and by reason thereof is vitally and critically needed by appellant in its multitudinous agricultural operations, and no satisfactory replacement for him can be obtained [R. 4-6].

That on June 30, 1942, Green duly registered with Local Board No. 144 of Santa Maria, California, and duly complied with all of the terms and provisions of and regulations under the Selective Training and Service Act [R. 3]: that appellant, on October 26, 1943, and March 30, 1944, filed affidavits with that Local Board claiming deferred classification for Green, and that these affidavits in substance stated the facts above set forth regarding appellant's agricultural activities and the duties and responsibilities of Green [R. 6].

That on July 11, 1944, the Department of Agriculture War Board wrote Green's Local Board to the effect that it had examined his case and found him to be even more critically needed by appellant than theretofore and that the manpower shortage on appellant's ranch put additional responsibilities on Green, and *strongly recommended his deferment* [R. 6-7]; that thereafter the Local Board, on July 22, 1944, classified Green in Class II-C (agricultural deferment class) upon a finding that he was necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, and no satisfactory replacement for him could be obtained [R. 7-8].

That on December 19, 1944, said Local Board, without any notice whatsoever to appellant or Green, and without any evidence whatsoever that Green did not, after his said clasisfication in Class II-C, remain engaged in an agricultural occupation or endeavor essential to the war effort or that a satisfactory replacement could be obtained for him, and without giving petitioner any hearing or any opportunity for a hearing at any time, reclassified Green from Class II-C to Class I-A, thereby making Green immediately eligible for service in the armed forces of the United States [R. 37]; that on December 23, 1944, ap-

pellant and Green received notice of said reclassification and, on the same day, appellant wrote said Local Board requesting a personal appearance before it and giving notice of appeal from said reclassification [R. 38]; that on January 2, 1945, appellant again wrote to the Local Board regarding the status of Green as follows:

> "The above registrant has been in the employ of Sisquoc Ranch Company for over one year and is fully conversant with the fixed plants, consisting of gas engine units, as well as the tractor and bulldozer equipment, of which he is a skilled operator.
>
> "He is now to be placed in charge of cattle feeding operations during the winter months involving the proper rationing to the beef cattle with which he is familiar.
>
> "He is a man of exceptional mechanical ability.
>
> "It is now submitted that *said registrant is a very necessary man in agriculture and can not be replaced. His loss will seriously affect the productive capacity of the Sisquoc Ranch Company.*" [R. 38]. (Italics ours.)

That said Local Board, upon receiving said letter, filed and made it a part of the records of said Local Board, and subsequently, on January 25, 1945, forwarded its said records on Green to the appropriate Appeal Board; that on January 30, 1945, the Appeal Board, without a dissenting vote, affirmed the action of said Local Board in reclassifying Green from Class II-C to Class I-A and classified Green in Class I-A, despite the fact that there was no evidence whatsoever in said Local Board record either that Green did not remain engaged in an agricultural occupation or endeavor essential to the war effort subsequent to his classification to Class II-C on or about July 19, 1944, or that a satisfactory, or any, replacement

for him could be obtained, and despite the fact that said Appeal Board knew and there was substantial and uncontradicted evidence in the said record, that the said Green did remain so engaged and in fact could not be replaced [R. 38-39].

That on March 3, 1945, appellant, by letter, requested said Local Board to reclassify Green into Class II-C, reiterating the facts above stated regarding Green's essentiality to it [R. 39]; that on March 6, 1945, the Government Appeal Agent wrote to the State Director of Selective Service in Sacramento regarding Green as follows:

> "The Board of Appeal of Santa Barbara County classified Homer Sheldon Green, Order No. 12901, in Class I-A on January 31, 1945. He is engaged in agriculture and is employed by the Sisquoc Ranch Company.
>
> *"I deem it to be in the national interest and necessary to avoid an injustice that you consider his claim for deferment and request the Board of Appeal to reconsider its determination or appeal to the President.*
>
> "I therefore recommend that you either request the Board of Appeal of Santa Barbara County to reconsider its determination or appeal to the President." [R. 9]. (Italics ours.)

That on March 17, 1945, Green received an order from said Local Board directing him to report to said board on March 30, 1945; that Green did report as requested and was transported to Los Angeles for a physical examination, and was thereafter ordered to report on April 6, 1945, for formal induction [R. 10-11].

That on April 5, 1945, the U. S. Department of Agriculture War Board wrote to said Local Board regarding the status of Green, as follows:

"Nature of duties now being performed by registrant: Assistant Superintendent of ranch in full charge when Superintendent is absent for several days in upper ranch working cattle. As electric power is not available he has responsibility of servicing gas engines, supplying irrigating water from four wells equipped with heavy duty pump. He is a skilled mechanic and operator of tractor and bulldozer for grading and leveling of land. He repairs and remodels ranch buildings and housing units. Present duties include feed and rationing of 100 head of beef steers now in feed-pens.

"This registrant is a steady and dependable worker. He is a trained man in agriculture, including livestock. *The Farm Labor Office at Santa Maria states that they have no replacement available.*

"Action of County War Board.

"The Santa Barbara County U. S. D. A. War Board has investigated this registrant and *finds that he is continuing to be a very essential man in agriculture.* The ranch, which is the largest in Santa Barbara County, *is inadequately manned at the present time.* They are one of the largest beef producer ranches in the county. Among one of the important crops produced annually is 2500 tons of sugar-beets as well as beans and vegetables. *We therefore strongly recommend continued deferment.*" [R. 11-12.] (Italics ours.)

B. Other Events and Proceedings.

After Green's induction on April 6, 1945, and on the same day, appellant filed the petition herein on its own behalf and on behalf of Green [R. 2-30], and the District Court issued an Order to Show Cause [R. 31] directed to Green's commanding officer at Fort MacArthur, California, requiring him to appear on April 16, 1945, to show cause why a writ of habeas corpus should not be issued. On April 16, 1945, a return to said Order to Show Cause was made and filed [R. 32-33], and after argument on the hearing as to whether a writ should issue, and the filing of memoranda of points and authorities by both parties, the court took the matter under submission and on May 31, 1945, issued an order denying the prayer of appellant's petition for the issuance of a writ of habeas corpus [R. 35]. Thereafter and on June 1, 1945, the District Court, with the consent of appellee's attorney, permitted appellant to file a motion for leave to amend its petition [R. 36] and, upon the hearing of said motion, and on June 5, 1945, the District Court granted the appellant leave to file said amendment to said petition and after further argument the District Court issued its final order denying the petition for issuance of a writ of habeas corpus [R. 46-47], and on the same day appellant, on its own behalf and on behalf of Green, served and filed a notice of appeal [R. 47].

That on June 29, 1945, the parties hereto, through their respective counsel, entered into a stipulation as to the record on appeal herein [R. 48], and on July 5, 1945, appellant delivered to the Clerk of the District Court its

Statement of the Points to Be Relied Upon and Designation of the Parts of the Record for Consideration, and thereafter on July 12, 1945, said statement and designation and the certified transcript of record was received by the Clerk of this Court, and this appeal was docketed [R. 50].

Specification of Errors Upon Which Appellant Will Rely.

I.

The District Court erred in denying the petition for a writ of habeas corpus in that the following facts alleged therein, each separately, constitute sufficient ground for the granting of said petition:

(a) That the Local Board reclassified Homer Sheldon Green from Class II-C to Class I-A without giving any notice of any kind whatsoever either to Sisquoc Ranch Company or to Homer Sheldon Green.

(b) That the reclassification action of the Local Board on or about December 19, 1944, was not supported by any evidence whatsoever either that Homer Sheldon Green did not remain engaged in an agricultural occupation or endeavor essential to the war effort subsequent to his classification in Class II-C on or about July 19, 1944, or that a satisfactory, or any, replacement for him could be obtained.

(c) That the Local Board gave Sisquoc Ranch Company no hearing on the said reclassification action by the Local Board of Homer Sheldon Green from Class II-C to Class I-A, even though a written request therefor had been promptly made.

(d) That the Appeal Board affirmed the action of the Local Board in reclassifying Homer Sheldon Green from

Class II-C to Class I-A and classified Homer Sheldon Green in Class I-A despite the fact that there was no evidence in the Local Board record before it either that Homer Sheldon Green did not remain in an agricultural occupation or endeavor essential to the war effort subsequent to his classification into Class II-C on July 19, 1944, or that a satisfactory, or any, replacement for him could be obtained, and despite the fact that the Appeal Board knew and there was substantial and uncontradicted evidence in the record affirmatively showing that Homer Sheldon Green did remain so engaged and in fact could not be replaced.

II.

That the District Court erred in denying appellant's petition for a writ of habeas corpus, as amended.

Issues Involved.

(1) Whether a draft board may reclassify a registrant from Class II-C (agricultural deferment class) to Class I-A without giving notice or hearing either to the registrant or his employer?

(2) Whether a registrant's employer is entitled to a hearing before the local board on the question of the essentiality and irreplaceability of the registrant as a farm worker?

(3) Whether a draft board may reclassify a registrant from Class II-C to Class I-A in the absence of any evidence that he either did not remain engaged in an agricultural occupation or was replaceable and in the presence of substantial and uncontradicted evidence that he did remain so engaged and was irreplaceable?

(4) Whether the court below should have undertaken judicial review of the actions of the draft boards?

Summary of Argument.

The Tydings Amendment to the Selective Training and Service Act (56 Stat. 1018; Title 50 App. U. S. C. A. 305(k)), placed certain limitations on the powers of draft boards to terminate agricultural deferments once granted. This was done because the temporary and uncertain nature of the agricultural deferment was causing serious manpower problems for farmers, resulting in actual curtailment of farm production at the very time when the nation's military and civilian needs required increased production.

Under the said Tydings Amendment, persons with farm deferments were required to be left deferred so long as they remained so engaged and were not replaceable. Green's local board arbitrarily terminated his farm deferment without giving notice of any kind to appellant or to Green and without having any evidence whatever either that there had been the slightest change in his essentiality or that he was replaceable. Furthermore, not only was the record barren of support for the action taken, but there was actually substantial and uncontradicted evidence before Green's Appeal Board requiring continued deferment. In addition, the Local Board refused to give appellant a personal hearing before it even though one was immediately requested and even though appellant advised the board that Green's loss would seriously affect the productive capacity of appellant's ranch. Thereafter Green was inducted into the Armed Forces.

Under these circumstances, the draft board actions, including Green's induction order, were, and his present detention is, unlawful and the court below should have issued the writ of habeas corpus. Its failure to do so was reversible error.

In the argument here presented, we will first consider the Tydings Amendment itself, the causes that led up to its enactment, the objectives sought to be achieved, its effects as related to this case, and the respects in which the activities of Green's draft boards were violations of the law. Next the argument will be directed to the reasons why, and authorities in support of the proposition that the court below committed reversible error in refusing to issue the writ. We shall present our argument under the following headings:

I. GREEN'S RECLASSIFICATION ON DECEMBER 19, 1944, FROM CLASS II-C TO CLASS I-A WAS IN VIOLATION OF THE TYDINGS AMENDMENT.

II. SINCE THE PETITION AS AMENDED ALLEGED ACTS AND OMISSIONS OF THE DRAFT BOARDS WHICH WERE CLEAR VIOLATIONS OF THE TYDINGS AMENDMENT, THE DISTRICT COURT SHOULD HAVE GRANTED THE WRIT OF HABEAS CORPUS.

III. SINCE RESPONDENT BELOW CONCEDED THE FACTS ALLEGED IN APPELLANT'S PETITION AND AMENDMENT THERETO, THERE IS NO OCCASION FOR FURTHER HEARING BELOW, AND THIS COURT SHOULD ORDER GREEN'S DISCHARGE FROM THE ARMED FORCES.

ARGUMENT.

I.

Green's Reclassification on December 19, 1944 From Class II-C to Class I-A Was in Violation of the Tydings Amendment.

The Tydings Amendment (56 Stat. 1018; Title 50 App. U. S. C. A. 305(k)), provides as follows:

> "*Every registrant found by a selective service local board*, subject to appeal in accordance with section 10(a) (2) [section 310(a) (2) of this Appendix], *to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, shall be deferred from training and service in the land and naval forces so long as he remains so engaged and until such time as a satisfactory replacement can be obtained: Provided*, That should any such person leave such occupation or endeavor, except for induction into the land or naval forces under this Act, his selective service local board, subject to appeal in accordance with section 10(a) (2) [section 310(a) (2) of this Appendix], shall reclassify such registrant in a class immediately available for military service, unless prior to leaving such occupation or endeavor he requests such local board to determine, and such local board, subject to appeal in accordance with section 10(a) (2) [section 310(a) (2) of this Apendix], determines, that it is in the best interest of the war effort for him to leave such occupation or endeavor for other work." (Italics ours.)

A. Background of Enactment of Tydings Amendment.

Originally the Selective Training and Service Act, enacted in 1940 (54 Stat. 885; Title 50 App. U. S. C. A. sec. 301 *et seq.*) contained no express provision for exemption or deferment of agricultural workers. This matter was governed through regulations issued by the Selective Service System administered by local boards. In the fall of 1942 serious curtailment of agricultural production resulting from the drafting of farm workers made it evident that there were defects in the deferment machinery as affecting agriculture. Local boards, under the regulations, granted farm workers only temporary deferments of three, four, five or six months, and farm workers were being drafted without the slightest consideration as to their need on the farm. Virtual chaos resulted. Farms and ranches could not operate on a month-to-month basis or even on a semiannual basis for agricultural planning depends on long-term calculations—from the tilling of the soil, to the planting of the seed, to the cultivation and irrigation and care of the growing crop, to the harvest—and even yearly plans intertwine with crop rotation and soil fortification and conservation. This uncertain deferment situation resulted in farm workers of draft age being drafted from and leaving the farms, causing loss of crops, forced sales of livestock not yet ready for the market, abandonment of acreage that should have been left in production, slaughtering of dairy cattle, and actual curtailment in agricultural production at a time when the Government was asking farmers to increase production substantially.

It was in this setting that the so-called Tydings Amendment to the Selective Service Act was conceived by Senator Tydings and enacted into law. (88 *Congressional Record,* Part 7, pp. 8639 to 8645.)

B. The Tydings Amendment (1) Abolished the Temporary Farm Deferment, (2) Required That Persons So Deferred and Their Employers Be Given Notice and Hearing Before Termination of Deferment, and (3) Made Such Termination Dependent on Evidence of (a) Discontinuance of Agricultural Essentiality or (b) Replaceability.

(1) This Appears From a Reasonable Construction of the Language of the Amendment Standing Alone.

The Tydings Amendment (56 Stat. 1018; Title 50 App. U. S. C. A. 305(k)) is clear:

> "Every registrant found by a selective service local board, subject to appeal in accordance with section 10(a) (2) [section 310(a) (2) of this Appendix], to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, shall be deferred from training and service in the land and naval forces so long as he remains so engaged and until such time as a satisfactory replacement can be obtained * * *."

When a man is placed in Class II-C, the agricultural deferment class, he has been found to be "necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort." Section 622.25-1 *Selective Service Regulations*, C. C. H. Manpower Law Service, p. 16,053-2. The Amendment then commands the draft board to defer the registrant "*so long as he remains so engaged and until such time as a satisfactory replacement can be obtained.*" (Italics ours.)

Certainly if the Amendment means anything at all, it means that the farmer can sow his seed without fear that his deferred farm worker, his means of raising the crop and harvesting it, will be suddenly, without notice to him

or his man, and *arbitrarily* taken from his farm. By the Amendment Congress abolished the temporary deferment situation that was causing so much havoc on the farms and withdrew the draft board's unfettered discretion once a farm deferment was granted and provided that only in the two situations specified, (1) discontinuance of agricultural activity or (2) replaceability, and after a "judicial" hearing, could a termination of the deferment be effected.

Unless this is what the Tydings Amendment accomplished, it was an idle gesture for it then made no change whatever in the existing law and practice regarding agricultural deferments.

(2) The Legislative History of the Amendment Makes This Plain.

Appellant submits that the Amendment is clear in itself; but if there be any question, the legislative history dispels all doubt.

The Amendment was introduced on the floor of the Senate without reference to conference. 88 *Congressional Record*, Part 7, p. 8644. Statements by its proponent, Senator Tydings, and its many supporters on the floor, are a recognized aid in the ascertainment of the legislative intent.

> *United States v. San Francisco*, 310 U. S. 16, 84 L.ed. 1050 (1940);
>
> *N. L. R. B. v. Thompson Products*, 141 F. (2d) 794 (C. C. A. 9th, 1944).

The impelling motive behind the Amendment, and its purpose to stabilize the agricultural deferment against temporary classifications and arbitrary reclassifications, is

succinctly and lucidly stated in Senator Tydings' opening remarks, as follows:

> "I was impelled to offer this amendment because of correspondence I have had with many farmers in my own State and some outside the State. I know of a farmer who, after he does his day's work, because all his help has left him, goes to his cornfield at night in his automobile and turns on his automobile headlights and husks his corn in order to get it into the barn. I know of a farmer who is sowing and drilling wheat by moonlight at night after his day's work is done in order to get his wheat planted. These are only examples of the extreme shortage of farm labor. All my amendment seeks to do is to provide that whenever a person is employed continuously in good faith in the production of food, and taking him off the farm would leave a large section of land uncultivated, and there is no replacement, *he shall be deferred upon those facts until a replacement can be found.*" (Italics ours.) 88 *Congressional Record*, Part 7, p. 8639.

The debate on the Amendment abounds in statements by Senators from all sections of the land concerning the serious consequences resulting from the uncertainty of farm deferments. The following are but a few:

> "Mr. Austin: It (the amendment) would at least result in a pause in the panic which is causing farmers to dispose of their herds and farms. Recently I have had absolute, certain proof of the sale of as many as 75 herds on farms in northern Vermont, putting out of commission seventy-odd dairies which are an essential part of the support of our armies." 88 *Congressional Record*, Part 7, p. 8641.

> "Mr. Capper: * * * Mr. President, if agriculture is to be deprived of its essential manpower, and

the farmer is unable to obtain needed farm machinery and equipment, we shall not have the increased production needed. Dairy herds are being dispersed all over the country because of the inability to obtain hired help. Dairy cows are being slaughtered by the tens of thousands just when we need increased production. The same is true in other farm lines." 88 *Congressional Record,* Part 7, p. 8644.

The problems of the range, resulting from temporary deferments, were stated in an editorial printed by Senate approval as follows:

"It does not make sense to a stockman to try to winter many cattle or sheep during the coming 6 months, with his already greatly reduced number of employees, if he has no assurance whatever that his labor problem will not become continuously more severe and difficult, with the result that 6 or 8 months from now he may have to sell at least a large part of his stock and at a time when they will not be in proper condition for market. Far better for him to sell now when the stock are in shape for market and not attempt to winter his normal number.

"A stockman must look ahead for about a year. He can't operate on a month-to-month or on a quarterly or even a semiannual basis. Quite naturally and understandably stockmen are besieging their local draft boards for information and advice. But the local boards have no information on which they can base definite advice as to next year." 88 *Congressional Record,* Part 7, p. 8640.

That the Amendment was designed to supplant the temporary four, five or six months farm deferment arrangement under which the draft boards were acting and to

provide for permanent deferment unless the draft board found a discontinuance of activity or replaceability, is clear from the following by the proponent of the Amendment:

> "Mr. Tydings: Let me point out to the Senator from Vermont the fact that many farmers must now put in their crops for harvest next year. *In my judgment, this amendment, if adopted now, would permit many of them to plant a crop for harvesting next year. Many crops, including dairy crops, would not be harvested if some assurance of this kind were not given.*" (Italics ours.) 88 *Congressional Record*, Part 7, p. 8641.

and from the following, among others:

> "Mr. Lee: I am strongly in favor of the amendment to defer farm labor. The selective service defers farm labor, but only for a certain period of time. Farm labor may be deferred for 6 months or a year; but the deferment is temporary.
>
> "As a result, quite often the man who is deferred feels that at the end of that period he will be drafted anyway; so he goes ahead and enlists.
>
> "However, if the original (Tydings) amendment becomes law it will give such a man a feeling of permanency and he is more likely to remain on the farm. I believe this is one of the most important amendments which have been offered. Already so many boys have left the farm that the situation has become critical. *Therefore, we must provide for the permanent deferment of enough men to keep the farms producing.*" 88 *Congressional Record*, Part 7, p. 8642. (Italics ours.)

The purpose of the Amendment, as stated above, was to remove the draft board's discretion once an agricultural deferment was granted, except where evidence on the two points mentioned, appeared. This was pointed out by Senator Maloney, who unsuccessfully proposed modification of the Tydings Amendment which would have required one year's farm activity as a prerequisite to deferment, when he said:

> "Mr. Maloney: * * * under the language of this (Tydings) amendment, men who now go to the farms are not going to go to war. This language is a directive. It says they shall be exempt after it is found that they are on the farms. *There is no discretion left the local boards.*" (Italics ours.) 88 *Congressional Record,* Part 7, p. 8644.

That Senator Maloney's interpretation was sound and not just an unimportant statement of a frustrated adversary, is clear from the fact that General Hershey, head of the Selective Service System, and in whose office the Amendment was drawn (88 *Congressional Record,* Part 7, p. 8639), agreed with that interpretation by providing in Local Board Memorandum No. 164 A, as follows:

> "Having made its decision that an individual registrant is necessary to and regularly engaged in an endeavor essential to the war effort, *the local board has no further discretion and must defer registrant.* No desire to meet calls for manpower should in any manner influence the local board's decision." (Italics ours.)

The above are not just isolated remarks by a few "farm senators." They are but a few among a great number of similar expressions, and are representative of the general view, as is evidenced by the vote which was

62 in favor and only 6 opposed. 88 *Congressional Record,* Part 7, p. 8645. The fact that there was common agreement during Congressional debate as to the purpose of the Act, may be properly considered in determining what that purpose was and what were the evils sought to be remedied.

Federal Trade Commission v. Raladam Co., 283 U. S. 643, 650, 75 L. ed. 1324, 1330 (1931).

(3) Effect of the Tydings Amendment.

Appellant submits that it is clear from the Amendment itself and its legislative history, that the legislative intent was to place curbs on draft boards in the matter of termination of farm deferments, in order to afford stability to the lingering agricultural production.

Temporary farm deferments were out. The farmer was to be freed of the worry that once his seed was sown, the harvest might be impossible as a result of a sudden drafting of his help with no consideration being given to his needs. Senator Tydings said the amendment would permit a farmer to plant his crop "now" for harvesting "next year" without fear that his help would be drafted, and that unless this assurance were given "many crops would not be harvested." (See page 18, *supra.*)

Furthermore, Congress, if it intended anything at all, clearly intended that a man, once deferred, should continue to remain in that status until such time as he (1) was no longer needed or (2) could suitably be replaced. As a result, the draft board's discretion was qualified; unless it had evidence on and found either of these elements, it was powerless to reclassify.

In addition, it follows from the requirement of evidence, that termination of an agriculture deferment must be pre-

ceded by notice and hearing—with all that those constitutional bywords import. To hold, as did the court below [R. 45], that appellant, Green's employer, was not entitled to notice and hearing, we respectfully submit is error when viewed in light of the manifest purpose of Congress not so much to come to the side of the individual farm worker (Green) but rather to protect the farmer, the employer, the man in appellant's position, upon whom the burden of agricultural production rested. The denial of a hearing to appellant is, by itself and entirely aside from the other irregularities relied on, a sufficient ground for reversal. This point is presented in detail on pages 26-28 of this brief.

If the above ends were not accomplished by the Tydings Amendment, then its passage was but an idle and useless act. Acts of Congress aspire to a higher dignity than this; and courts will not so construe them.

> *Sunshine Anthracite Coal Co. v. Adkins*, 310 U. S. 381, 84 L. ed. 1263 (1940).

C. Under the Admitted Facts in the Case at Bar, the Tydings Amendment Was Clearly Violated.

There is no dispute as to the facts [R. 46]. Green was given an agricultural deferment on July 19, 1944 after the local board had received evidence as to his essentiality to appellant's agricultural activities and after deferment had been "strongly recommended" by the U. S. Department of Agriculture War Board.

Then, without warning or notice to appellant or Green, the local board on December 19, 1944, reclassified Green

from Class II-C into Class I-A, making him immediately eligible for military service, and this was done *in the absence of any evidence whatever* either that there had been the slightest change in Green's agriculture activities or that any replacement for him was available. Thereafter, the local board denied a hearing to appellant even though one had been been requested by it and even though it had written the board on January 2, 1945 that Green was very necessary to its agricultural operations and was not replaceable and that "His loss will seriously affect the productive capacity of the Sisquoc Ranch Company" [R. 38]. Fortunately appellant had filed notice of appeal and, after several weeks, Green's file, together with the letter of January 2, 1945, was forwarded to the Appeal Board, which in due time, affirmed the action of the local board. The Appeal Board did so despite the absolute lack of evidence to support its action on either of the two points made mandatory by Congress, viz., (1) discontinuance of essential agricultural activity or (2) replaceability, and despite the admitted presence in the record before it of "*substantial and uncontradicted evidence*" [R. 41] to the contrary on both points.

Not only was there not one scintilla of evidence to support the actions of the local and appeal boards, but the record was actually replete with evidence that could point only in one direction—deferment. Much of that evidence —and by far the weightiest—came from no less impartial a source than the Federal Government. The U. S. Department of Agriculture War Board, the agency one of whose jobs it was to investigate and report on claims

for agricultural deferments, found Green to be essential to appellant's agricultural operations and irreplaceable and "strongly" recommended deferment to Green's local board. Even after the Appeal Board had acted, the U. S. Department of Agriculture War Board took the extraordinary step of communicating with Green's local board, reporting its findings as to Green's continued essentiality and irreplaceability and again "strongly" recommended "continued deferment." Even the Government Appeal Agent, an official of the Selective Service System itself (*Selective Service Regulations,* Sec. 603.71, C. C. H. Manpower Service, p. 16,007), after the action of the Appeal Board, wrote the State Director of Selective Service and asked that the termination of Green's agricultural deferment be reconsidered "in the national interest" and in order "to avoid an injustice" [R. 9].

It is difficult to conceive of more flagrant violations of the Tydings Amendment. This was the sort of thing that was curtailing agricultural production and so aroused Congress that it enacted the Tydings Amendment without even referring it to Committee, and it was this that Congress thought it was outlawing. With all due respect to Green's draft boards, it is submitted that they recklessly and arbitrarily disregarded the express command of Congress when they caused Green's induction on such a record —no notice; denial of hearing to appellant; and not even a shred of evidence, good, bad or indifferent, to support its action and in the face of substantial and uncontradicted evidence against its action.

II.

Since the Petition as Amended Alleged Acts and Omissions of the Draft Boards Which Were Clear Violations of the Tydings Amendment, the District Court Should Have Granted the Writ of Habeas Corpus.

The court below refused to undertake judicial review of the actions of Green's draft boards, despite clear and uncontradicted allegations of the petition as amended of violations of the Tydings Amendment. This was error warranting reversal, for draft boards are not above the law or the courts, even though it is undoubtedly true that a high degree of finality attaches to their findings of fact. Nor does appellant seek to relitigate questions of fact. This is simply a case where the draft boards had *NO* facts to support their actions and where appellant and Green were denied procedural due process in the matter of notice and hearing.

A. After Administrative Remedies Had Been Exhausted, and After Green's Induction, Habeas Corpus Was the Proper Procedure to Obtain Judicial Review.

The petition as amended alleges that after the action of the local board, Green's case was appealed to the Appeal Board which, without a dissenting vote, affirmed the action of the local board [R. 39]. Under the Selective Service Regulations issued pursuant to the Selective Training and Service Act, this was the end of appellant's and Green's administrative remedies. Sec. 628.2 *Selective Service Regulations*, C. C. H. Manpower Law Service, p. 16, 110. Appellant also alleged that Green had been inducted and "* * * is as of the time and date of the filing of this petition, and has from the date of his induction been,

wrongfully restrained of his liberty and held in wrongful custody by the Armed Forces of the United States * * *." [R. 14.]

These allegations establish the required basis for a petition for a writ of habeas corpus to review draft board action alleged to be without due process and in violation of law.

In the case of *United States ex rel Phillips v. Downer*, 135 F. (2d) 521 (C. C. A. 2, 1943), the Circuit Court, at page 522, said:

> "Since the draftee has, therefore, obeyed the law by responding to the call for induction and has relied upon the writ of habeas corpus to test his legal rights, questions of procedure such as have arisen in cases of a similar nature are here avoided and he has placed himself in the proper position to challenge the legality of his induction."

See also:

United States ex rel Levy v. Cain, 149 F. (2d) 338, at p. 342 (C. C. A. 2, 1945);

United States v. Bowles, 131 F. (2d) 818 (C. C. A. 3, 1943), affd. 319 U. S. 33, 87 L. ed. 1194 (1943).

B. The Draft Board Decisions Should Have Been Subjected to Judicial Review for Violations of Law and Denials of Due Process Alleged by Petitioner.

Appellant does not dispute that the draft board decisions on questions of fact are final. In fact, the Selective Training and Service Act so provides (Title 50 App. U. S. C. A. sec. 310). But where a draft board has violated the law or denied due process, the courts will not hesitate to undertake judicial review, nullify the induction and order the release of the registrant.

(1) Denial of Hearing to Appellant Required Issuance of the Writ.

The denial of a hearing by the local board to appellant, Green's employer, even though promptly requested by it, was clearly a denial of due process into which the District Court should have inquired. Only in April of this year Judge Learned Hand of the Circuit Court of Appeals for the Second Circuit wrote an opinion in the case of *United States ex rel Levy v. Cain*, 149 F. (2d) 338, 341, reversing an order which quashed a writ of habeas corpus, and ordering an inductee released from the Armed Forces because the local board had, to some extent, relied on a recommendation of a panel of experts, without disclosing to the registrant the identity of the members of the panel. Now, there was nothing in the statute or regulations requiring such disclosure. Yet the court was of the opinion that non-disclosure was a procedural irregularity tantamount to a denial of a fair trial since it prevented effective challenge as to bias, predelictions or acquaintance with the subject for decision of the panel members.

What greater denial of fairness could there be than the local board's refusal to grant appellant's request for a personal appearance on the issue of Green's continued essentiality and irreplaceability, especially in light of the clear intention of Congress primarily to assist farmers in retaining the help that is necessary and irreplaceable, in order to avert the food crisis that was facing the nation as a result of the drafting of needed farm workers without consideration of the farmers' needs (see pages 15-20 above)?

Does it make a particle of sense to say to the farmer, "your workers will not be taken off your farms so long as they remain engaged as essential farm workers and are

not satisfactorily replaceable" and then when the draft board proceeds to take steps to draft a farm worker for the board to deny that farmer a personal hearing even though he (1) makes an immediate request therefor and (2) writes the board that the farm worker is still essential on his farm and cannot be replaced and that his loss will seriously affect the productive capacity of the farm? This is precisely what happened in this case [R. 38, 39].

Does it not seem fundamental that the farmer should be the very person, above all others, who is entitled to a hearing upon these issues since he is the one who was given relief by the Tydings Amendment? Must he not be given an opportunity personally to acquaint the board members with his particular farming problems, to meet and discuss the ideas of the board members and, if necessary, produce other facts or information so as to enable him to give the board members as complete a picture as possible of all factors bearing on the issues?

We earnestly contend that the right to a personal hearing was, by necessary implication, conferred upon the farmer when Congress enacted the Tydings Amendment.

We respectfully submit that this denial of hearing to appellant was so fundamental a denial due process that it was error for the District Court to refuse to inquire into it.

In the case of *Chin Yow v. United States*, 208 U. S. 8, 52 L. ed. 369 (1908), the opinion by Mr. Justice Holmes is squarely in point. There the District Court had also denied a petition for a writ of habeas corpus. The petition claimed the administrative order to be invalid because petitioner had been denied a hearing before the administrative body. The Supreme Court, in reversing the District Court dismissal of the petition, held that the allega-

tions were sufficient to warrant the issuance of the writ, and, at page 12, said:

> "The decision of the Department is final, but that is on the presupposition that the decision was after a hearing in good faith, however summary in form. As between the substantive right of citizens to enter and of persons alleging themselves to be citizens to have a chance to prove their allegation, on the one side, and the conclusiveness of the Commissioner's fiat, on the other, when one or the other must give way, the latter must yield. In such a case something must be done, and it naturally falls to be done by the courts."

Just as the Act there involved provided that the department's decision was "final", so does the Selective Training and Service Act provide with respect to draft board decisions. Yet the Supreme Court recognized the right of the person affected by the administrative action to a personal hearing and held that a denial of this right went to the very heart of constitutional guarantees. It is submitted that the considerations in the *Chin Yow* case and our case are parallel and that it was error for the Court to refuse to inquire into appellant's denial of a hearing.

(2) Failure of Local Board to Give Notice to Either Appellant or Green Before It Terminated His II-C Classification, Required Issuance of the Writ.

One of the effects of the Tydings Amendment was to abolish the temporary farm deferment that had been causing so much instability in the farm labor market and to curb the powers of the draft boards to reclassify persons with agricultural deferments until there was evidence of

(1) continuance of essentiality or (2) replaceability. (See pages 20-21 above.) It is axiomatic that such findings necessarily require notice and hearing, for otherwise there is no opportunity to present evidence, and the rudiments of fair play essential to the validity of administrative actions would be denied.

American Toll Bridge Co. v. Railroad Commission, 307 U. S. 486, 83 L. ed. 1414 (1939);

Consolidated Edison Co. v. N. L. R. B., 305 U. S. 197, 83 L. ed. 126 (1938);

Shields v. Utah Idaho C. R. Co., 305 U. S. 177, 83 L. ed. 111 (1938);

Morgan v. United States, 304 U. S. 1, 82 L. ed. 1129 (1938).

Consequently the action of Green's local board in terminating his II-C classification on December 19, 1944, was error in law and in itself required issuance of a writ of habeas corpus.

In *United States ex rel Boye v. Downer*, 143 F. (2d) 125 (C. C. A. 2, 1944), an inductee was ordered released from the Armed Forces because the local board "clearly disregarded the regulations" of the Selective Service System, and in *United States ex rel Phillips v. Downer*, 135 F. (2d) 521, (C. C. A. 2, 1943) another inductee was released because the local board had misinterpreted the law as to the conscientious objection exemption.

Similarly the failure to give notice before termination of Green's II-C classification was error in law and in itself rendered the induction unlawful.

(3) Lack of Any Evidence, Substantial or Otherwise, to Support the Termination of Green's Agricultural Deferment, Required Issuance of the Writ.

The Government has conceded that Green's local and appeal boards had no evidence whatsoever to support its action [R. 40, 41, 44 and 46]. Here certainly is a sufficient ground for the issuance of a writ. Perhaps the most authoritative decision on this point, because of its recentness and thorough treatment of the subject, and because the United States Supreme Court denied *certiorari*, is *United States ex rel Trainin v. Cain*, 144 F. (2d) 944 (C. C. A. 2, 1944) (*cert. den.* Jan. 8, 1945, 89 L. ed. 412), in which the Circuit Court, at page 947, said:

> "Undoubtedly the statutory provision that decisions of the selective service board shall be 'final' narrowly limits the scope of judicial examination of board actions; but it is clear that Congress through use of such words cannot deny any registrant the constitutional protections of due process of law. See Angelus v. Sullivan, 2 Cir., 246 F. 54, 63, and cases cited therein. Thus it is error reviewable by the courts when it appears that the proceedings conducted by such boards 'have been without or in excess of their jurisdiction, or have been so manifestly unfair as to prevent a fair investigation, or that there has been a manifest abuse of the discretion with which they are invested under the act.'"

and at page 948, said:

> "*to deny review, whatever may be the facts, so long as the forms of law have been followed, is to constitute arbitrary and unfair action*, as was held in Arbitman v. Woodside, supra, *which is not consonant*

with our historic ideas of due process. To hold the findings final if supported by any evidence seems an apt compromise between the conflicting ideals of expeditious functioning of the draft laws and requital of the historic guarantees of due process of law." (Citations omitted.) (Italics ours.)

Also in the same Circuit in *United States ex rel Phillips v. Downer*, 135 F. (2d) 521 (C. C. A. 2, 1943) the court ordered the inductee released from the Armed Forces because of the denial of claim for a conscientious objection exemption had been based entirely upon a play written by the inductee which the local board construed to indicate that his conscientious objection was based on political objections rather than religious beliefs. The court considered the play at great length in its opinion and concluded that the construction given it by the draft board was erroneous and that the play could not be considered to be "any substantial evidence to support the draft classification."

In our case, there admittedly was no evidence whatsoever, good, bad or indifferent, to support Green's classification from II-C to I-A.

This point was also squarely raised in *Arbitman v. Woodside*, 258 F. 441 (C. C. A. 4, 1919), in a habeas corpus case growing out of the first World War. The local board had denied the inductee's claim for exemption as an alien despite the lack of any support for its action. The Circuit Court, in reversing the District Court's denial of a writ, at page 442, said:

"The rule is established that the action of such executive boards within the scope of their authority is final, and not subject to judicial review, when the investigation has been fair and the finding supported

by substantial evidence; but upon proof that the investigation has not been fair, or that the board has abused its discretion by a finding contrary to all the substantial evidence, relief should be given by the courts under the writ of habeas corpus." (Extensive citations omitted.)

The authority of this case has been brought up to date by virtue of the strong reliance placed upon it by the *Trainin v. Cain* case decided by the Second Circuit Court of Appeals last year and discussed above on pages 30-31.

See also:

Graf v. Mallon, 138 F. (2d) 230, 234, 235 (C. C. A. 8, 1943);

United States v. Messersmith, 138 F. (2d) 599 (C. C. A. 7, 1943);

Seele v. United States, 133 F. (2d) 1015 (C. C. A. 8, 1943);

Benesch v. Underwood, 132 F. (2d) 430-431 (C. C. A. 6, 1942);

Rase v. United States, 129 F. (2d) 204, 207 (C. C. A. 6, 1942);

Johnson v. United States, 126 F. (2d) 242 (C. C. A. 8, 1942).

(4) Termination of Agricultural Deferment in the Teeth of Substantial and Uncontradicted Evidence to the Contrary, Required Issuance of Writ.

Not only was the action of Green's draft board a violation of law because not supported by any evidence, as pointed out above, but Green's Appeal Board also admittedly acted in the face of substantial and uncontradicted evidence supporting the claim for continued de-

ferment [R. 41, 43-46]. The seriousness of this violation becomes evident from the fact that this Court has held Appeal Board action to be *de novo* and to completely supersede that of the local board.

> *Cramer v. France*, 148 F. (2d) 801 (C. C. A. 9, 1945).

The entire argument considered above to the effect that draft board action must be supported by substantial evidence, applies as well under this head. The violation charged is the more aggravated, however, because there was actually substantial and uncontradicted evidence before the Appeal Board in support of continued deferment. In the language of the Eighth Circuit, such a classification:

> "* * * made in the teeth of all of the substantial evidence before such (draft) agency is not honest but arbitrary. Courts can prevent arbitrary action of such agencies from being effective."
>
> *Johnson v. United States*, 126 F. (2d) 242, 247 (C. C. A. 8, 1942).

The Sixth Circuit has likewise held that if the draft board has found:

> "* * * contrary to all the substantial evidence, the courts are open for relief under the writ of habeas corpus."
>
> *Benesch v. Underwood*, 132 F. (2d) 430, 431 (C. C. A. 6, 1942).

See also:

> *Rase v. United States*, 129 F. (2d) 204 (C. C. A. 6, 1942).

If the court below was right in refusing to issue the writ despite the fact that there was substantial and uncon-

tradicted evidence before the Appeal Board requiring continued deferment and not one piece of evidence opposed, then it is respectfully submitted that there is no such thing as judicial review, no matter how restricted, over draft board action so long as the draft board goes through the motions of correct procedure. Substance then abdicates to form and the law means nothing for it cannot be brought to bear on the draft board. But the courts will not tolerate this for, as was so well stated in the case of *Trainin v. Cain,* 144 F. (2d) 944, at page 948:

> "* * * to deny review, whatever may be the facts, *so long as the forms of law have been followed*, is to constitute arbitrary and unfair action, as was held in Arbitman v. Woodside, supra, *which is not consonant with our historic ideas of due process.*" (Italics ours.)

(5) None of the Violations Herein Alleged Have Been Passed On in This Circuit.

There has been no direct holding in this Circuit on the questions here presented by appellant, though this Court on several occasions has been asked to review convictions for failure to report for induction

> *Crutchfield v. United States*, 142 F. (2d) 170 (C. C. A. 9, 1943);
>
> *Bagley v. United States*, 144 F. (2d) 788 (C. C. A. 9, 1944),

and *habeas corpus* proceedings *where the evidence before the draft board was conflicting.*

> *Cramer v. France*, 148 F. (2d) 801 (C. C. A. 9, 1945);
>
> *Sullivan v. Swatzka*, 148 F. (2d) 965 (C. C. A. 9, 1945).

The *Bagley* and *Crutchfield* cases are of no particular help here since they merely go to the point that wrongful action by draft boards cannot be raised by way of defense to a criminal proceeding for failure to report for induction.

See also:

Falbo v. United States, 320 U. S. 549, 88 L. Ed. 305 (1944).

Their only value here is on the point that the procedure employed in the case at bar, that is, exhaustion of administrative remedies and petition for writ of *habeas corpus* after induction, is the proper way to raise the questions herein presented.

The *Cramer* and *Swatzka* cases, *supra,* did employ the proper method of attack and in both the inductees were remanded to the Armed Forces. However, in both cases, the draft boards had evidence to support the denial of the claims for agricultural deferments. In fact, in each case, the U. S. Department of Agriculture War Board recommended *against* deferment as opposed to consistent recommendations *in favor* of deferment in our case [R. 6, 7, 11 and 12].

It is admitted in the case at bar that there is no conflict in the evidence before the draft board. All of the evidence was in support of continued deferment [R. 23-30, 38-39, 44, 46].

In the *Swatzka* case, this Court did recognize that draft boards are "required" to act "judicially." It can hardly be said that such requirement was observed in the case at bar.

C. The Fact That Appellant Rather Than Green Requested the Deferment Is Not Basis for Denying Issuance of the Writ.

In its oral opinion, the court below noted that Green had "not himself made any application or request to the local board for a deferment, under the Tydings Amendment" [R. 45].

This, however, is not ground for refusing to issue the writ as the Selective Service Regulations, C. C. H. Manpower Law Service, pp. 16,041 to 16,111, confer on employers the *right to request deferments as well as rights of appeal,* as follows: An employer may file with the local board affidavits for occupational classification (Sec. 621.4(b), and may present information, documents, affidavits or depositions in support thereof (Sec. 621.4(c)). The local board must, on classification of registrant, mail advice thereof to the employer (Sec. 623.61(b)). The employer may request the local board to reopen and consider anew registrant's classification (Sec. 626.2), and when the local board at any time determines registrant should be "considered for classification into a class available for military service," it must in certain cases notify the employer and allow him 15 days to file an affidavit (Sec. 626.2-1). The employer may appeal from any determination of a local board (Sec. 627.2(a)), and, upon appeal, may submit certain information regarding the local board action (Sec. 627.12). The local board must advise the employer of the Appeal Board action (Sec. 627.31(a)), and, in a proper case, the employer may appeal to the President (Sec. 628.2).

The petition clearly alleges that appellant applied for and obtained an agricultural deferment for Green [R. 6, 15-22]. Therefore, there was no irregularity in the fact that appellant rather than Green took the necessary steps for deferment before Green's draft board.

D. The Fact That Petition to the District Court Was Made by Appellant Rather Than Green Is Not Basis for Denying Issuance of the Writ.

(1) There Can Be No Question That Petition on Behalf of Green Was Authorized.

In the case of *Collins v. Traeger*, 27 F. (2d) 842 (C. C. A. 9, 1928), this Court held that the petitioner for a writ of habeas corpus need not be the person restrained of his liberty where it appeared that the restrainee was in custody and in peril of being removed from the jurisdiction of the court before he could act in person. The petition herein sufficiently alleges these conditions [R. 3].

(2) Furthermore, Appellant Had Standing in Its Own Right to Petition for the Writ.

Reference is made to the argument above (p. 26-28) to the effect that the Tydings Amendment was primarily enacted for the benefit of farmers in order to assist them in keeping needed and irreplaceable farm help. It necessarily follows that appellant had the right to question the violation to his detriment of the statute enacted for his benefit. The fact that the administrative order here operates directly on Green rather than on appellant does not deprive appellant of standing to challenge it since appellant has a sufficient interest in Green's freedom from restraint by virtue of employer-employee relationship.

In the case of

Baltimore & O. R. Co. v. United States, 264 U. S. 258, 68 L. ed. 667 (1924),

it was held that a railroad had a sufficient interest in an administrative order rendered in favor of a competitor railroad to entitle it to judicial review of the order.

See also:

Moffat Tunnel League v. United States, 289 U. S. 113, 77 L. ed. 1069 (1933).

III.

Since Respondent Below Conceded the Facts Alleged in Appellant's Petition and Amendment Thereto, There Is No Occasion for Further Hearing Below, and This Court Should Order Green's Discharge From the Armed Forces.

At the hearing in the court below on the sufficiency of the petition and amendment thereto, the respondent conceded that all the facts alleged therein were true *and that it could add nothing* to the petition and the affidavits, records attached thereto, and the additional matters presented in the amendment to the petition, and that accordingly there was no need for a hearing [R. 44]. And in its opinion the court below stated:

> "The court sees no reason why, in view of the statement of the Government, that there is no dispute with reference to the facts stated in the petition and the amended petition, there should be any necessity for a hearing. It will therefore be assumed that all

of the facts stated in the petition and the amendment to the petition for the Writ of Habeas Corpus are conceded by the Government, the same as if a hearing were held." [R. 46.]

We therefore respectfully submit that the order of the court below should be reversed and that this Court should by its order direct the release of Green from the custody of the Armed Forces.

Respectfully submitted,

L. K. Vermille,
Carl J. Schuck,
Overton, Lyman, Plumb,
Prince & Vermille,
Attorneys for Appellant.

No. 11096.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SISQUOC RANCH COMPANY, a Corporation, on its own behalf and on behalf of Homer Sheldon Green,

Appellant,

vs.

MAX ROTH, Lt. Colonel, Infantry, Army of the United States,

Appellee.

APPELLEE'S BRIEF.

CHARLES H. CARR,
United States Attorney,
JAMES M. CARTER,
Assistant United States Attorney,
WILLIAM STRONG,
Special Assistant to the U. S. Attorney,
ROBERT E. WRIGHT,
Assistant United States Attorney,
United States Postoffice and
Courthouse Bldg., Los Angeles (12),
Attorneys for the Appellee.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES.

MISCELLANEOUS.

No. 11096.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SISQUOC RANCH COMPANY, a Corporation, on its own behalf and on behalf of Homer Sheldon Green,

Appellant,

vs.

MAX ROTH, Lt. Colonel, Infantry, Army of the United States,

Appellee.

APPELLEE'S BRIEF.

Jurisdiction.

The District Court had jurisdiction under Section 751 of the Judicial Code (28 U. S. C. A. 451). The final order of the District Court was entered on June 5, 1945 [R. 47]. This Court has jurisdiction under Section 765 of the Judicial Code (28 U. S. C. A. 463).

Statutes and Regulations Involved.

Section 751 of the Judicial Code (28 U. S. C. A. 451), provides:

> "Section 451. Power of courts. The Supreme Court and the district courts shall have power to issue writs of habeas corpus."

Section 10(a)(2) of the Selective Training and Service Act of 1940 (50 U. S. C. App. 310(a)(2)) provides in part:

> "(2) * * * There shall be created one or more local boards in each county or political subdivision * * *. Such local boards, under rules and regulations prescribed by the President, shall have power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards. The decisions of such local boards shall be final except where an appeal is authorized and is taken in accordance with such rules and regulations as the President may prescribe. * * * The decision of such appeal boards shall be final in cases before them on appeal unless modified or changed by the President as provided in the last sentence of section 5(1) of this Act * * *."

Section 5(k) of the Selective Training and Service Act of 1940, as amended, known as the "Tydings Amendment" (50 U. S. C. App. 305(k)), provides:

> "(k) Every registrant found by a selective service local board, subject to appeal in accordance with section 10(a)(2), to be necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort, shall be deferred from training and service in the land and naval forces so long as he remains so engaged and until such time as a satisfactory replacement can be obtained: *Provided*, That should any such person leave such occupation or endeavor, except for induction into the land or naval forces under this Act, his selective serv-

ice local board, subject to appeal in accordance with section 10(a)(2), shall reclassify such registrant in a class immediately available for military service, unless prior to leaving such occupation or endeavor he requests such local board to determine, and such local board, subject to appeal in accordance with section 10(a)(2), determines, that it is in the best interest of the war effort for him to leave such occupation or endeavor for other work."

Statement.

Homer Sheldon Green, the inductee on whose behalf appellant seeks the writ of habeas corpus, registered with his local draft board under the Selective Training and Service Act of 1940, on June 30, 1942 [R. 3]. At that time Green appears to have been about 19 years of age [R. 2].

Green's classifications by the local and the appeal boards under the Selective Training and Service Act between June 30, 1942, and January 10, 1944, do not appear in the record.[1]

---

[1]The local board's files as to Green were not made a part of the record herein by appellant, and the copies of letters and other materials included in the record obviously constitute only a portion of those files, which include memoranda of local and appeals board actions, and other items, including a lengthy questionnaire required from all registrants pursuant to Selective Service Regulation 621.1 and 621.2. These provide:

> 621.1 *Mailing Questionnaires.* (a) The local board shall mail a Selective Service Questionnaire (Form 40) to each registrant in strict accordance with the order numbers, from the smallest to the largest. Selective Service Questionnaires (Form 40) shall be mailed as rapidly as possible, consistent with the ability of the local board to give them prompt consideration upon their return.
>
> 621.2. *Time allowed to return Questionnaire.* (a) Unless the local board grants an extension of time, as explained below, the registrant shall complete and return his Selective Service Questionnaire (Form 40) within 10 days after the date on which it is mailed to him * * *

Insofar as the record reveals, appellant employed Green on about October 15, 1943 [R. 22, 28]. However, on October 8, 1943, appellant filed with Green's local board a request for Green's deferment on occupational grounds for a period of one year [R. 16, 18], and on October 26, 1943, filed a supplemental request for such deferment [R. 15-17]. Green did not at any time seek deferment [R. 45].

On January 10, 1944, Green's local board classified him in Class II-C (occupational deferment for agricultural workers) until April 4, 1944 [R. 18].[2] On March 30, 1944, appellant filed with Green's local board another request for the occupational deferment of Green [R. 6, 18], and on July 22, 1944, the local board again classified Green in Class II-C [R. 7, 23]. Six months later, on December 21, 1944, the local board unanimously reclassified Green from Class II-C to Class I-A (available for military service) [R. 3, 8, 23]. Thereupon appellant, not Green, filed an appeal from the action of the local board [R. 8, 23, 26], and on February 27, 1945, the appeal board, upon consideration of the appeal voted unanimously to classify Green in Class I-A [R. 3, 23, 26, 45].

On March 3, 1945, appellant wrote to the local board, demanding that the appeal board reconsider its action and that Green be placed in Class II-C [R. 9, 23-28], and on March 6, 1945, the Government appeals agent wrote to

---

[2]Green probably was reclassified I-A at the end of this period. [See R. 27.]

the State Director of Selective Service, recommending that the latter request the appeal board to reconsider its I-A classification of Green, or himself appeal to the President [R. 9-10]. On March 16, 1945, the State Director rejected both requests [R. 10].

On March 30, 1945, Green, complying with an order of his local board, reported to an induction center for a physical examination, and was notified next day to report for induction into the armed forces of the United States on April 6, 1945 [R. 10, 11, 32].

On April 5, 1945, appellant again sought to obtain from the local board Green's continued deferment, but without success [R. 11-12], and Green was inducted into the armed forces on April 6, 1945 [R. 32].

On that day, also, appellant obtained from the District Court an order to show cause why a writ of habeas corpus releasing Green should not be granted. [R. 31]. Respondent thereupon filed a return to the order to show cause and a hearing was had before the district court on April 16, 1945 [R. 33-34]. The Court denied appellant's petition for a writ of habeas corpus on May 31, 1945 [R. 35]. Thereafter, on June 5, 1945, a second hearing was had upon the petition with certain amendments, and the Court again denied the petition, as amended [R. 36-43, 46-47].

In dismissing appellant's petition on June 5, 1945, the District Court specifically noted that Green had not made any application or request for deferment in Class II-C [R. 45]. The Court then recited that Green was clas-

sified on July 22, 1944, as an agricultural worker, that he was thereafter reclassified I-A and notified of his classification; that his employer, appellant, requested a hearing under the reclassification, which was denied by the local board; and that appellant thereupon appealed to the appeal board, which unanimously affirmed Green's I-A classification. The Court then concluded that appellant, the employer of Green, was not entitled to notice, and that "the contractual relation of the Ranch Company [appellant] and the registrant, Green, did not supersede the general welfare of the nation, and did not give the Ranch Company, the employer, the standing contended for" by it [R. 45].

Question Presented.

The sole question presented is whether Green was denied due process by the selective service boards.[3]

---

[3]While appellant presents four "issues" which it considers to be before this Court (App. Br. p. 9), the sole question before this Court, we submit, is that stated above. We shall, however, dispose of appellant's other contentions in our argument.

ARGUMENT.

There Was No Denial of Due Process by the Selective Service Boards.

I.

Appellant's basic complaint is predicated upon the fact that Green, once having been classified in Class II-C, was thereafter reclassified to Class I-A, which action, appellant asserts (App. Br. pp. 14-24), was in contravention of the provisions of the so-called "Tydings Amendment," *supra*. According to appellant, in effect, a registrant cannot be reclassified from Class II-C without proof that he is no longer engaged in an agricultural occupation or pursuit essential to the war effort, which proof, appellant in effect, asserts, was lacking in Green's case, constituting a lack of due process. There is no merit to these contentions.

It is settled, of course, that Congress having made no provision in the Selective Training and Service Act for the review of draft board classifications by the courts, no such review will be undertaken.[4] In fact, appellant

---

[4]Appellant's contentions (App. Br. p. 30) that respondent concedes that there is no evidence whatsoever to support the local and appeal board's reclassification of Green, is plainly unsound. As we demonstrate below, the local and appeal boards considered not only the registrant's file but also the relative needs of agriculture and the armed forces, and other general factors which are necessarily before the boards. Moreover, for the purposes of expeditious disposal of appellant's amended petition, which on its face presents only issues of due process, respondent in effect demurred, conceding for that purpose that there is no dispute as to the "facts" stated in the petition and the amended petition, these "facts" relate to the procedural steps involved in Green's various classifications and reclassifications, and obviously do not include appellant's conclusions as to the sufficiency of the evidence before the local and appeal boards. Cf. *Cramer v. France*, 148 F. (2d) 801 (C.C.A. 9). As stated above, also, the file which was before the Selective Service boards must by law con-

specifically concedes that "draft board decisions on questions of fact are final" (App. Br. p. 25).

In this instance, not only the local board, but also the appeal board and the State Director of Selective Service independently, but unanimously, agreed that upon all of the evidence before them, considered in the light of various exigencies of the war and other general conditions (see *infra*), Green should now be classified I-A.

In thus acting, the local and appeal boards proceeded under Section 10(a)(2) of the Selective Training and Service Act (*supra,* p. 2) and the applicable regulations, which provide the local boards with authority to reconsider the classification of any registrant at any time prior to induction; Selective Service Regulation 626.1 which provides in part that "No classification is permanent"; Regulation 626.2(a) which authorizes a local board to reopen and reconsider anew the classification of a registrant either upon the request of certain designated persons or "upon its own motion if such action is based upon facts not considered when the registrant was classified which would justify a change in the registrant's classification"; and Regulation 622.25-2, which provides

---

tain, in addition to the items which appellant introduced in evidence, at least the questionnaire which is required of each registrant. It is self-evident, therefore, that respondent's concession as to the "facts" embraced only those facts material to the issues before the district court, namely the facts as to procedure. The sufficiency of the evidence upon which Green's classifications and reclassifications were based, was not in issue, and appellant's conclusions as to such sufficiency were plainly not accepted by respondent in its concession.

that II-C deferments shall be for a period of six months or less, at which time they are to be reopened for reconsideration.[5]

The "Tydings Amendment" in effect affirms and directly contemplates this continuing process of classification as applicable to persons deferred under its provisions, by specifically stating that a registrant is to be deferred "so long as" he remains regularly engaged in an agricultural occupation or endeavor "essential to the war effort," and "until such time as a satisfactory replacement can be obtained." Plainly this amendment on its face contemplates periodic reconsideration of a registrant's status in the light of the various conditions in the community best known to the local boards, to enable them to determine whether the registrant remains "regularly engaged" in an agricultural occupation, whether "a satisfactory replacement can be obtained," and whether the specific occupation or endeavor in which the registrant is engaged is "essential to the war effort," all considered in the light of the needs of the armed forces.

---

[5]This section provides as follows:

"622.25-2 *Length of Deferments in Class II-C.* (a) Class II-C deferments * * * shall be for a period of six months or less, * * * If there is change in the registrant's status during the period of deferment in Class II-C, his classification shall be reopened and considered anew.

"(b) At the expiration of the period of a registrant's deferment in Class II-C, his classification shall be reopened. The registrant should be continued in Class II-C for a further period of six months or less if such classification is warranted. A registrant * * * shall not be continued in Class II-C unless the local board is satisfied that a satisfactory replacement cannot be obtained. The same rules shall apply when again classifying a registrant at the end of each successive period for which he has been classified in Class II-C.

The consideration of such factors in the reclassification process was specifically directed by Lewis B. Hershey, National Director of Selective Service, who in part stated in the January, 1945, issue of "Selective Service":

"The Selective Service System has the job of furnishing 750,000 acceptable men to the land and naval forces before July 1, 1945. These men should be the best that can be made available as combat replacements. In recent months the armed forces have repeatedly stressed their extreme need for young men. The supply of men 18 through 29 and of the types essential to the successful prosecution of the war by the armed forces is most limited. It is evident that there are insufficient men below 26 years of age to meet the calls which will be placed upon the local boards.

"The continued production of the munitions of war and of food must be maintained. This production can and must be maintained by the use of the least possible number of deferred men within the age group 18 through 29, and of the physical standards required by the armed forces.

"The decision for each registrant must be made initially by his local board. * * *

"During this month certain coordinated steps have been taken by the Government to aid in the procurement of suitable young men for the armed forces and to assist in the continued production of the munitions of war. * * *

"Regardless of these measures the necessity of finding all available men under 26 requires the most careful screening of all such men.

"Many individuals believe that Section 5(k) of the Selective Training and Service Act (The Tydings Amendment) creates an exemption for farmers,

but, as you well know, the amendment prescribes the requirements that a man must meet for agricultural deferment and does not provide an exemption from military service. It vests in the local boards the duty of determining, in the case of each registrant, whether or not such registrant meets the requirements of law after a full consideration of all of the pertinent facts. These facts include the extent the registrant is engaged in agriculture, how essential in the war effort are the products of his efforts, how necessary is he to this production, and whether there is a replacement available.

"The urgent present need for young men by the armed forces cannot fail to be a factor which the local boards must weigh in considering deferment from service. The Act of which Section 5(k) is a part was passed in the words of the Act itself because 'the Congress hereby declares that it is imperative to increase and train the personnel of the armed forces of the United States.'"

"The local boards are ever conscious that their primary job has always been to procure men of the right age and type for the land and naval forces. They have considered always that the fundamental policy of Congress was expressed in these words, 'The Congress further declares that in a free society the obligations and privileges of military training and service should be shared generally in accordance with a fair and just system of selective compulsory military training and service.'

"The Congress originally delegated to the President the power to issue regulations to govern deferments; it later provided by the Tydings Amendment the method to be used in determining whether or not a registrant should be given an agricultural deferment. Neither of these provisions change the fun-

damental purpose of the Act, which was to provide men for the armed forces, or the basic principle of a fair and just system of selective compulsory military training and service.

"State Director Advice No. 288 provided information which had been furnished by the Secretaries of War and Navy, by the Chairman of the War Production Board and War Food Administrator. *It includes a finding by the President that the need for all of the men now agriculturally deferred in II-C under 26 years of age is not as essential to the war effort as is the need for young men in the armed forces.* It was stated that the President felt that in view of existing conditions, agriculture, like other war industries with few exceptions, can be carried on by those above 26. [See *infra.*]

"The purpose of State Director Advice No. 288 was to provide the information as to the current urgent needs of the armed forces and the relative needs of agriculture to the local boards for their most serious consideration. It did not seem to me at that time necessary to indicate that there was no intention to annul, to change, or to ignore the provisions of the Tydings Amendment, as State Director Advice No. 288 specifically stated: '*The President has authorized me to ask you to take such action in connection with the administration of the Tydings Amendment as may be necessary to provide to the full extent permitted by law for the reclassification and induction of the men agriculturally deferred in the age group 18 through 25.*'

"* * * The effort was to bring to each member of the Selective Service System full information concerning the present situation in the words of those primarily responsible for the prosecution of the war. The duty then rested on the local board to consider

each case and decide which registrants still met the requirements of the law for agricultural deferment.

"I am aware of the tremendous responsibilities which the necessities of war now place upon local board members. I am aware of the great fund of good judgment and fortitude which local board members have displayed for more than 4 years. I am reassured by the knowledge that when you have weighed all of the factors you will, pursuant to the provisions of the Tydings Amendment, render your own judgment to defer consistent with the needs today of the armed forces for young fighting men." (Italics added.)

State Director Advice No. 288 issued January 3, 1945, provides:

"The following letter from the Director of the Office of War Mobilization and Reconversion has been received by the Director of Selective Service:

'The Secretaries of War and Navy have advised me jointly that the calls from the Army and Navy to be met in the coming year will exhaust the eligibles in the 18 through 25 year age group at an early date. The Army and Navy believe it essential to the effective prosecution of the war to induct more men in this age group.

'You have reported that other than the men becoming 18 years of age the only remaining substantial source in this age group is in the 364,000 men now deferred because of agricultural occupation. You have further advised me that if this group is not available, you must call into the service occupationally deferred men in the next age group, 26 years and older, most of whom are fathers.

'The Chairman of the War Production Board, Mr. Krug, advises me that the loss of these men

would make it extremely difficult, if not impossible, to meet critical war demands. Moreover, these older men would not meet the expressed needs of the Army and Navy.

'The War Food Administrator, Mr. Jones, has advised me that although we still need all of the food we can raise, the loss of production through the induction into the armed services of the physically qualified men in this 18 through 25 year age group who do not clearly fall within the scope of the Tydings Amendment should not result in a critical condition.

'The Tydings Amendment to the Selective Service Act does not give the agricultural worker absolute exemption from selective service. It was not so intended. In asking Congress to adopt this amendment Senator Tydings said: "All my amendment seeks to do is to provide that whenever a person is employed continuously in good faith in the production of food, and taking him off the farm would leave a large section of land uncultivated, and there is no replacement, he shall be deferred upon those facts until a replacement can be found."

'I have reported these facts to the President. He has found that the further deferment of all men now deferred in the 18 thru 25 age group because of agricultural occupation is not as essential to the best interest of our war effort as is the urgent and more essential need of the Army and Navy for young men. The President feels in view of existing conditions, agriculture like our other war industries can, with few exceptions, be carried on by those in the older age groups.

'The President has authorized me to ask you to take such action in connection with the administration of the Tydings Amendment as may be neces-

sary to provide to the full extent permitted by law for the reclassification and induction of the men agriculturally deferred in the age group 18 through 25.'

"Forward text of Justice Byrnes' letter to all local boards and boards of appeal. *Direct all local boards to promptly review the cases of all registrants ages 18 through 25 deferred in class II-C* excluding those identified by the letters 'F' or 'L.' *In considering the classification or retention of such registrants in class II-C, local boards will consider the President's finding that 'the further deferment of all men now deferred in the 18 through 25 age group because of agricultural occupation is not as essential to the best interest of our war effort as is the urgent and more essential need of the Army and Navy for young men.'* Also direct local boards to issue orders for preinduction physical examination to all registrants ages 18 through 25 in class II-C excluding those identified with the letters 'F' or 'L' in accordance with the most expeditious schedules it is possible for you to arrange with the commanding general of your service command. In order to accomplish the review and preinduction physical examination as promptly as possible, local boards may conduct the review of any such class II-C registrants at the same time as they are forwarding such registrants for preinduction physical examination. (Italics added.)

Hershey."

That the construction of the "Tydings Amendment" contended for by appellant is not correct is further conclusively demonstrated by the fact that Congress, itself recognizing the retention of discretion in the selective service boards under that amendment, sought to

remove its discretionary character, but was unsuccessful. Thus during the early part of this year the Congress submitted to the President House Joint Resolution 106, which would further amend the "Tydings Amendment" by causing the further deferment of agricultural workers by limiting the basis upon which the local boards could predicate their findings for classification purposes. The resolution provided:

"H. J. Res. 106.

"Seventy-Ninth Congress of the United States of America: At the first session, begun and held at the City of Washington on Wednesday, the third day of January, One Thousand Nine Hundred and Forty-Five Joint Resolution to amend Section 5(k) of the Selective Training and Service Act of 1940, as amended, with respect to the deferment of registrants engaged in agricultural occupations or endeavors essential to the war effort.

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That Section 5(k) of the Selective Training and Service Act of 1940, as amended, is amended by adding at the end thereof the following new paragraph:

'In carrying out the provisions of this subsection, the selective-service local board in classifying the registrant *shall base its findings solely and exclusively on whether the registrant is necessary to and regularly engaged in an agricultural occupation or endeavor essential to the war effort and whether a satisfactory replacement can be obtained, without reference to the relative essentiality of the registrant to an agricultural occupation or endeavor as compared with any other occupation, service, or*

endeavor; and the foregoing provision of this sentence shall apply upon any appeal or review of a decision made thereunder by a selective-service local board. Such deferment shall be made by said board without consideration of any other circumstance or condition whatsoever; and during the period of such deferment for such purpose, no other classification, of said registrant, shall be made by said board: Provided, That no registrant who is qualified to serve in the armed forces shall be deprived thereby of the right to volunteer for such service.' " (Italics added.)

On May 3, 1945, the President returned to the Congress this Resolution without approval, stating in part:

"I return herewith, without my approval, House Joint Resolution 106, to amend Section 5(k) of the Selective Training and Service Act of 1940, as amended, * * *. The indicated purpose of the amendment is to cause the deferment of large number of registrants engaged in agricultural production.

"In time of war it is the paramount obligation of every citizen to serve his country to the best of his ability. Under our democratic system male citizens are selected for service in the armed forces pursuant to an act of Congress which prescribes a fair and impartial method of selection. It is the essence of that act, the Selective Training and Service Act of 1940, that no one shall be placed in a favored position, and thus safeguarded from the hazards of war, because of his economic, occupational, or other status. The sole test under the law is whether the individual can better serve his country in the armed forces or in an essential activity in support of the war effort.

"The Congress, when it passed the Selective Training and Service Act in 1940, wisely provided that no deferment from service in the armed forces should be made in the case of any individual — except upon the basis of the status of such individual, and no such deferment shall be made of individuals by occupational groups * * *.

"I do not believe that it was the real intent of Congress that agricultural workers should be given blanket deferment as a group, *or that Congress intended to enact legislation formulating the national policy that agricultural employment was more essential than any other type of employment, including service in the armed forces of the United States in the protection of our country.* Nevertheless, the legislation now passed by the Congress and presented for my approval would appear to have that result and to constitute a departure from the sound principle hereinbefore stated on which we have erected our military manpower mobilization system. It would apparently provide that, *in determining an individual deferment, the relative essentiality of the the agricultural occupation cannot be gauged against an industrial occupation or against military service itself. Thus in practical effect it would single out one special class of our citizens, the agricultural group, and put it on a plane above both industrial occupation and military service.*

"Enactment of such a law would * * * do violence to the basic principle embodied in Section 5(e)(1) of the Selective Training and Service Act, which prohibits deferment by occupational groups or groups of individuals, a principle which was incorporated into the present law because of the deferment scandals of the last war, particularly in shipyards. The

resolution would also limit the authority now vested in the President by Section 5(1) to make final determination of all questions of exemption or deferment under the act, *and would deprive him of the right to determine the relative essentiality of the needs of agriculture and the armed forces.*

"In my opinion, no group should have any special privileges, and, therefore, I am returning the joint resolution without my approval." (Italics added.)

The Congress refused to override the President's rejection, 91 Cong. Rec. 4232.

Manifestly the local board was not only within its right but under the specific duty of reconsidering Green's II-C classification from time to time in the light of its prior knowledge and action in the case, new or additional evidence before it as to Green particularly or as to general conditions bearing upon the question of the armed forces' needs, the essentiality of Green's and appellant's work to the war effort, the general availability of replacements for workers of Green's type, the relative needs of agriculture, particularly appellant, and the armed forces, and the President's and Hershey's directives, while at least the appeal board in addition considered general information concerning other relevant economic, industrial and social conditions (627.24).[6] Regardless of whether the local and appeals boards may have concluded—as they readily could—that Green was not irreplacable, that he

---

[6]It should be noted also in this respect that even the "facts" presented by appellant in its various writings can readily support the conclusion that Green was engaged in automotive, machine and construction work rather than in agricultural pursuits [R. 5, 11, 15, 25], and that he was thus performing functions for which facilities and replacements were available.

was not engaged in an endeavor essential to the war effort, or that he or appellant in other respects were not within the intent or spirit of the "Tydings Amendment," the needs of the armed forces were paramount and, if necessary, every person deferred in Class II-C could have been reclassified 1-A and inducted into the armed forces.

Finally, while appellant complains against the local board, it is clear that the action of the appeal board only is in issue since the appeal board considered the entire matter *de novo* (Cf. the *Cramer* case, *supra*), and reached a similar conclusion by a unanimous vote of its members;[7] and the State Director of Selective Service likewise concurred that Green's I-A classification was proper.

---

[7]Appellant points to various statements made by it and to other material which it offered in support of its deferment claim as constituting "substantial and uncontradicted evidence supporting the claim for continued deferment" (App. Br. pp. 32-33). As we have said, this "evidence" was not all that was before the boards. But even if it was the sole evidence as to Green's role in appellant's enterprise, the boards were not required to accept such evidence or to accord it full or even any weight, or, if credited, to accept it in disregard of prevailing general conditions, the needs of the armed forces, or other similar considerations.

As stated by this Court in *Sullivan v. Swatzka*, 148 F. (2d) 965, 966:

> "Petitioner's position appears to be that claim for agricultural deferment must be granted unless the Local Board is presented with evidence contradictory to that offered by the registrant. But the boards have no facilities for assembling evidence. The board members are non-paid citizens of the community, and one claiming deferment must establish to the satisfaction of his board that he is entitled to it. The Appeal Boards are granted broad general powers by the Regulations."

And clearly the opinions and recommendations of the War Board of the United States Department of Agriculture to the local board, and of the appeals agent to the State Director of Selective Service were no more than mere conclusions on their part which are entitled only to weight as such but are in no wise determinative of Green's classification status.

II.

Appellant asserts (App. Br. p. 24) that it and Green were "denied procedural due process in the matter of notice and hearing" that appellant received no hearing before the *local board* (App. Br. p. 26) although, appellant claims, it was entitled to such a hearing; that the classification action of the *local board* was "final" in a sense requiring a hearing before it (App. Br. p. 28); and that the local board should have given appellant or Green notice prior to reclassifying Green (App. Br. pp. 28-30). These contentions are without merit.

(a) Selective Service Regulation 625-1 provides that every registrant,[8] and no other person, shall have the right to appear before his local board *after* his classification has been determined.[9]

---

[8]Section 601.11 defines a registrant as "a person registered under the Selective Service law * * *."

[9]"625.1. *Opportunity to appear in person.* (a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (Form 57) to him. * * *

"(b) No person other than the registrant may request an opportunity to appear in person before the local board."

Also:

"625.2 *Appearance before local board.* (a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. * * * (b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which

Appellant is not the registrant; and appellant does not claim that *Green* was denied the opportunity of appearing before the local board in accordance with the provisions of the applicable regulations (*supra*).

There is no provision for the appearance of the registrant's employer before the local board. Appellant's contention that "by necessary implication" (App. Br. p. 27) the employer was given such the right to a personal appearance by the "Tydings Amendment" is entirely without basis; no such right was either provided for or is present by implication. Of course, appellant's further contention that a personal hearing had to be accorded it because the local board's "decision was 'final'" (App. Br. p. 28) is likewise baseless, since the classification of Green is necessarily that accorded to him by the appeal board, which acts *de novo* in the matter (See *supra*, p. 20.) And appellant's complaint, if any, should be directed toward the appeals board, which, however, grants no personal hearings to registrants.

(b) There is no substance, also, to appellant's contention that the local board's failure to give Green or appel-

---

he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing or, if oral, shall be summarized in writing and, in either event, shall be placed in the registrant's file. * * * (c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and shall again classify the registrant in the same manner as if he had never before been classified. * * *. (d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant, shall mail notice thereof on the Notice of Classification (Form 57) to the registrant and on Classification Advice (Form 59) to the persons entitled to receive such notice or advice on an original classification under the provisions of section 623.61."

lant notice *before* reclassifying Green from II-C was a fatal error requiring issuance of the writ of *habeas corpus* (App. Br. pp. 28-29). Appellant does not—nor can it—assert that notice of the local board's action was not given appellant or Green after Green had been reclassified. Such notice obviously was given. And that is all that was required by the regulations (625-1, *supra*). Moreover, appellant availed itself of its right to appeal to the board of appeal (Regulation 627.2), which reconsidered the case, and then classified Green in Class I-A (*supra*).

Conclusion.

Appellant has failed to establish that Green was denied due process in his classification by the selective service boards.

We concur in the conclusion of the court below that "the contractual relation of the Ranch Company [appellant] and the registrant, Green, did not supersede the general welfare of the Nation * * *." Appellant plainly has no standing or cause to complain either on its own behalf or on behalf of Green. The order of the District Court dismissing the petition for a writ of *habeas corpus* should be affirmed.

Respectfully submitted,

CHARLES H. CARR,
United States Attorney,
JAMES M. CARTER,
Assistant United States Attorney,
WILLIAM STRONG,
Special Assistant to the U. S. Attorney,
ROBERT E. WRIGHT,
Assistant United States Attorney,
Attorneys for the Appellee.

No. 11096.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SISQUOC RANCH COMPANY, a corporation, on its own behalf and on behalf of Homer Sheldon Green,

Appellant,

vs.

MAX ROTH, Lt. Colonel, Infantry, Army of the United States,

Appellee.

APPELLANT'S REPLY BRIEF.

L. K. VERMILLE,
CARL J. SCHUCK,
OVERTON, LYMAN, PLUMB,
PRINCE & VERMILLE,
733 Roosevelt Building, Los Angeles 14,
Attorneys for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

Cases.

Statute.

No. 11096.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SISQUOC RANCH COMPANY, a corporation, on its own behalf and on behalf of Homer Sheldon Green,

Appellant,

vs.

MAX ROTH, Lt. Colonel, Infantry, Army of the United States,

Appellee.

APPELLANT'S REPLY BRIEF.

I.

The Issue on Appeal.

Appellee's brief leaves the impression that this is an appeal after a hearing on the *merits,* as if issue had been joined below. In fact, it is devoted almost entirely to argument based on "evidence" outside the record on which, presumably, appellee would have liked to have built a defense. Appellee, however, did *not* join issue below with the petition but merely, in effect, demurred. Since the District Court refused to issue the writ, the only question here is whether the petition as amended is suf-

ficient and, for that purpose, all material allegations must, as a matter of law, be deemed to be true.

In addition, appellee's attorney stated in the court below that he "could add nothing" to the petition as amended [R. 44], and that there was "no dispute with reference to the facts stated in the petition and the amended petition" [R. 46], which led the Court below to state that it could see no reason why "there should be any necessity for a hearing."[1] [R. 46.]

So appellee, not having joined issue with the petition as amended, is, for better or worse, limited to the petition so far as the facts on this appeal are concerned.

What then are those facts? The petition as amended is clear: (1) no notice was given to appellant or Green before Green's reclassification from Class II-C to Class I-A; (2) the reclassification action was not supported *by any evidence whatsoever* either that Green no longer remained engaged in essential agriculture or that he was replaceable; (3) appellant was denied a hearing before the local board even though prompt request had been made, and (4) the Appeal Board affirmed the local board's action despite the fact that there was *no* evidence either

---

[1]Now appellee tries to hedge on his concession by stating it related only to facts concerning "procedural steps" and not to other facts alleged in the petition (Appellee's Br. p. 7)—assertedly because appellant raised only questions of procedural due process below. However, a glance at the petition as amended will readily show that questions of substantive as well as procedural due process are squarely raised by the petition [R. 8, 13, 14, 37, 39, 40, and 41]. Furthermore, it will be noted that appellee made no comment when the Court, on the basis of the concession referred to, stated: "It will therefore be assumed that all of the facts stated in the petition and the amendment to the petition for the Writ of Habeas Corpus are conceded by the Government the same as if a hearing were held" [R. 46].

that Green did not remain engaged in an essential agricultural occupation or was replaceable, and despite *substantial and uncontradicted evidence* affirmatively showing that Green remained engaged in essential agricultural occupation and was irreplaceable.

These are the *only* facts on which appellee may argue its case—not on facts outside the record, or which appellee might have introduced in evidence at a hearing, such as the Selective Service Questionnaire and the rest of the draft board file on Green, to which appellee makes repeated reference in his argument (Appellee's Br. pp. 3, 7, 8, 19).

The sole question here, therefore, is whether the petition as amended states a sufficient cause of action to warrant the issuance of a writ[2] and to entitle appellant to a hearing on the merits. And until that stage is reached, most of appellee's argument is beside the point.

II.

Judicial Review.

Appellee disposes of the vital question of judicial review with a wave of the hand and the easy generalization that "It is settled, *of course*,[3] that Congress having made no provision in the Selective Training and Service Act for the review of draft board classifications by the courts, no such review will be undertaken" (Appellee's Br. p. 7). Appellant respectfully submits that if this proposition is so well settled as to require no citation of authority,

---

[2]The statement made by appellee (Appellee's Br. p. 6) that "The sole question presented is whether Green was denied due process by the selective service boards," is clearly erroneous, as there was no hearing below on the merits.

[3]Italics ours.

despite the numerous citations and quotations to the contrary appearing in appellant's brief from pages 24 to 35, appellee should have closed his brief at that point without any further argument, as no one aggrieved by a draft board decision would then be entitled to a day in court.

The answer, of course, is that the courts will undertake judicial review of draft board actions alleged to be in violation of law and to constitute a deprivation of due process (see authorities cited in appellant's brief pp. 24 to 35).

III.

The Effect of the Tydings Amendment.

The heart of appellee's position seems to be the statement, also totally unsupported by citation of authority, that "every person deferred in Class II-C could have been reclassified I-A and inducted into the armed forces," even if the draft boards determine such person to be regularly engaged in essential agriculture and to be irreplaceable (Appellee's Br. pp. 19-20). In other words, appellee takes the position that the Tydings Amendment—an act of Congress—can be disregarded by draft boards with impunity and that these administrative agencies are completely above the law and beyond reproach.

If true, this astounding theory would undermine the very freedoms for the defense of which the military might of this nation was marshaled. We doubt seriously whether even the Selective Service Authority would subscribe to it, for Lewis B. Hershey, Selective Service Director, in an article quoted in appellee's brief, beginning on page 10, seems to admit that the Tydings Amendment does have force of law. Indeed, that statement by Hershey, in lucidly outlining the duties of the draft boards under the Tydings Amendment, puts the finger on the very thing

appellant complains was not done in this case. To quote from appellee's brief, on page 11, Hershey stated:

> "It (the Tydings Amendment) vests in the local boards the *duty* of determining, in the case of each registrant, whether or not such registrant meets the requirements of law after a *full* consideration of *all* of the pertinent facts. *These facts include the extent the registrant is engaged in agriculture, how essential in the war effort are the products of his efforts, how necessary is he to this production, and whether there is a replacement available.*" (Italics ours.)

Appellant's main grievance is that the draft boards caused Green's induction without giving consideration to *any* "of the pertinent facts"—the facts regarding Green's agricultural activities, the essentiality to the war effort of the products of his effort, his necessity and irreplaceability, and the findings of the U. S. Department of Agriculture War Board strongly recommending Green's deferment. The petition as amended squarely alleges that the Appeal Board had *no evidence whatsoever* before it on these issues, except *substantial and uncontradicted evidence* to the effect that Green remained engaged in an essential agricultural occupation and was irreplaceable. The propriety of an induction on such a record is the issue that appellee must meet on this appeal!

IV.

The So-called Presidential Findings.

Appellee's brief makes numerous references to a so-called "finding" by the President "that the need for all of the men now agriculturally deferred in II-C under 26 years of age is not as essential to the war effort as is the need for young men in the armed forces" (Appellee's Br. pp. 12, 14, 15). Presumably, appellee is grasping at this straw

to cure the total lack of evidence to support Green's induction. Obviously even this so-called "finding" can be of no assistance. First of all, the sole power to make findings rests in each case with the draft boards.

Title 50 App. U. S. C. A. 310 (a) (2);

Falbo v. United States, 320 U. S. 549;

United States v. Peterson, 53 F. Supp. 760 (D. Calif. 1944);

United States v. Kowal, 45 F. Supp. 301.

Secondly, the so-called "finding" merely says that men under 26 years of age were more needed in the armed forces than on the farms, and therefore has no relation whatever to the criteria prescribed in the Tydings Amendment governing the question of agricultural deferability, viz., (1) continuance in essential agricultural occupation, and (2) irreplaceability. Obviously, the "finding" could not supply deficiencies in evidence on the two cardinal points prescribed by Congress, for otherwise an apparently oral, unpublished "finding" by the President contained in an unpublished letter from the head of one of his administrative agencies to the head of another, could effectively repeal any act of Congress.

V.

Denial of Hearing.

Appellee answers appellant's complaint that it was denied a personal hearing before the local board, by stating that Selective Service Regulations make "no provision for the appearance of the registrant's employer before the local board," and then gives the surprising advice that "appellant's complaint, if any, should be directed toward the

appeals board, which, however, grants no personal hearings to registrants" (Appellee's Br. p. 22). In other words, if we understand appellee's point, appellant was entitled to *no* hearing *anywhere* because Selective Service Regulations make no provisions therefor. This, of course, begs the question for, as argued in appellant's brief beginning on page 26, the denial of a hearing to appellant, constituted a denial of due process and inconsistent regulations are, to that extent, mere nullities.

Conclusion.

We respectfully submit that appellee has utterly failed in its brief to meet—or even to argue—the issues involved in this appeal, and appellant's authorities have been completely ignored.

This case is just an instance of administrative action totally unsupported by evidence and of other denials of due process. These issues are squarely raised by the petition as amended and are the only issues before this Court. We submit that it was error for the District Court to refuse to issue the writ.

Respectfully submitted,

L. K. Vermille,
Carl J. Schuck,
Overton, Lyman, Plumb,
Prince & Vermille,
Attorneys for Appellant.

No. 11098

United States
Circuit Court of Appeals
For the Ninth Circuit.

STELLA WHEELER BISHOP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court of the United States

Rotary Colorprint, 661 Howard Street, San Francisco

No. 11098

United States

Circuit Court of Appeals

For the Ninth Circuit.

STELLA WHEELER BISHOP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court of the United States

Rotary Colorprint, 661 Howard Street, San Francisco

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Taxpayer:

HERMAN PHLEGER, Esq.,
THEODORE R. MEYER, Esq.,
ROBERT H. WALKER, Esq.

For Comm'r:

T. M. MATHER, Esq.

STELLAR WHEELER BISHOP,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transferred to Judge Arundell 12/8/44

DOCKET ENTRIES

1944

Apr. 20—Petition received and filed. Taxpayer notified. Fee paid.

Apr. 20—Copy of petition served on General Counsel.

Apr. 24—Request for Circuit hearing in San Francisco filed by taxpayer. 4/25/44 Granted.

May 15—Answer filed by General Counsel.

May 15—Request for hearing in San Francisco, filed by General Counsel.

May 19—Copy of answer and request served on taxpayer. (San Francisco, Calif.)

1944

Aug. 10—Hearing set September 18, 1944—San Francisco, California.

Sep. 18—Hearing had before Judge Van Fossan on merits. Appearances of Robert H. Walker filed. Stipulation of facts filed. Briefs due 10/18/44. No replies.

Oct. 14—Transcript of hearing 9/18/44 filed.

Oct. 16—Brief filed by taxpayer.

Oct. 16—Brief filed by General Counsel. Copy served 10/17/44.

Nov. 13—Motion for leave to file a reply brief filed by taxpayer. 11/13/44. Granted.

Nov. 13—Reply brief filed by taxpayer.

Nov. 14—Copy of motion and reply brief served on General Counsel.

1945

Jan. 16—Findings of Fact and Opinion rendered. Judge Arundell. Decision will be entered under Rule 50. Copy served 1/17/45.

Feb. 15—Computation of deficiency filed by General Counsel.

Feb. 20—Hearing set 3/28/45 on settlement.

Mar. 28—Hearing had before Judge Arundell on settlement. Decision to be entered in accordance with respondent's computation.

Mar. 29—Decision entered. Judge Arundell. Div. 6.

Jun. 15—Bond in the amount of $2,200.00 approved and filed.

Jun. 18—Petition for review by U. S. Circuit Court of Appeals, 9th Circuit, with assignments of error filed by taxpayer.

Jun. 18—Proof of service filed.

1945

Jun. 18—Statement of points relied upon on petition for review filed by taxpayer with proof of service thereon.

Jun. 18—Designation of record filed by taxpayer with proof of service thereon. [1*]

The Tax Court of the United States

Docket No. 4594

STELLA WHEELER BISHOP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his Notice of Deficiency, "IRA:90-D, AVD," dated February 29, 1944, and as a basis of her proceeding alleges as follows:

I.

The petitioner is an individual, residing at 2006 Washington Street, San Francisco, California. The return for the period here involved was filed with the Collector of Internal Revenue for the First Collection District of California.

---

*Page numbering appearing at top of page of original certified Transcript of Record.

II.

The Notice of Deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on February 29, 1944. This Petition is filed for a redetermination of said [2] deficiency and a determination that petitioner has made an overpayment of tax for the taxable year in respect of which the Commissioner determined the said deficiency, and this Court has jurisdiction thereof by virtue of Sections 272(a) (1) and 322(d) of the Internal Revenue Code of the United States.

III.

The taxes in controversy are income taxes for the calendar year 1940 in the amount of $1,070.23, claimed in the Notice of Deficiency, and $1,198.63, claimed herein as a refund.

IV.

The determination of tax set forth in the said Notice of Deficiency is based upon the following errors:

1. The Commissioner erred in increasing income from personal services by the sum of $964.04 due to the receipt by petitioner in 1940 of a fee of $1,928.09 as executrix of the Estate of Roy N. Bishop, deceased, such fee having been paid from funds in which petitioner had a present and existing interest equal to that of the Estate of Roy N. Bishop, deceased, so that only one half thereof, to wit, the sum of $964.05, was taxable to petitioner as reported on her return. (Adjustment (a), page 2 of Statement, Exhibit A.)

2. The Commissioner erred in ruling that the deduction of $8,421.69 claimed by petitioner on her return for the taxable year 1940 as her share of the long-term capital losses [3] from the sale of community property by the Estate of Roy N. Bishop, the deceased husband of petitioner, is not allowable and that such losses were deductible only on the return for the said estate, and in reducing the amount of long-term capital losses reported on said return from $18,034.99 to $9,613.30. (Adjustment (c), page 2 of Statement, Exhibit A.)

3. The Commissioner erred in disallowing the deduction of transfer taxes on the sale of securities and automobile taxes paid by said estate, said securities and automobile constituting community property of petitioner and said Roy N. Bishop and said taxes being paid from funds in which petitioner had a present and existing interest equal to that of said estate. (Adjustment (d), page 2 of Statement, Exhibit A.)

4. The Commissioner erred in decreasing dividends received by the said Estate of Roy N. Bishop, deceased, from securities constituting community property of petitioner and said Roy N. Bishop and in which petitioner had a present and existing interest equal to that of said Roy N. Bishop or his said estate, by the amount of $2,149.55 and in ruling that such dividends were taxable to the estate and not to petitioner. (Adjustment (e) (1), pages 2-3 of Statement, Exhibit A.)

5. The Commissioner erred in decreasing interest on bank deposits and bonds by $32.15 and

$100.00, respectively, and in decreasing income taxes paid at the source on tax-free [4] covenant bonds by the sum of $2.00, said bank deposits and bonds constituting community property of petitioner and said Roy N. Bishop and in which petitioner had a present and existing interest equal to that of said Roy N. Bishop or his estate. (Adjustments (f), (g) and (h) of Statement, Exhibit A.)

V.

The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) Petitioner and Roy N. Bishop were married on the 9th day of May, 1907, and remained married continuously thereafter until the 20th day of December, 1938, when said Roy N. Bishop died. Said Roy N. Bishop and petitioner Stella Wheeler Bishop were residents of, and domiciled in the State of California continuously from the year 1909 to the 20th day of December, 1938, in the case of said Roy N. Bishop, and to the present time in the case of petitioner.

(b) On April 20, 1931, July 24, 1937, July 26, 1937, and October 29, 1937, respectively, petitioner and said Roy N. Bishop acquired securities of the kinds and in the amounts set forth in the schedule annexed hereto and marked Exhibit B. Said securities were acquired with funds constituting community property of petitioner and said Roy N. Bishop and in which petitioner had a present and existing interest equal to that of said Roy N. Bishop under Section 161a of the Civil Code of the [5]

State of California, added by Chapter 265 of the California Statutes of 1927, effective July 29, 1937.

(c) Thereafter on December 20, 1938, said Roy N. Bishop died and on January 9, 1939, the Will of said Roy N. Bishop, deceased, was admitted to probate by the Superior Court of the State of California, in and for the City and County of San Francisco. Said Will named petitioner and the Crocker First National Bank of San Francisco as executrix and executor, respectively, of the Will and estate of said Roy N. Bishop, deceased. The amount of the gross estate of said Roy N. Bishop, deceased, was as reported on his Federal Estate Tax Return filed with the Collector of Internal Revenue for the first California District on March 19, 1940, to wit, $316,805.05, all of which constituted community property of said decedent and petitioner, as finally determined by the Final Decree of Distribution entered by said Superior Court on July 22, 1940. The aggregate amount of debts owed by said Roy N. Bishop at the date of his said death and for which claims were filed against the Estate of said Roy N. Bishop, deceased, was as shown on said Federal Estate Tax Return, to wit, $6,382.16. All said debts were paid in full by said estate on or before June 3, 1939.

(d) Thereafter, on March 18, 19, 20, 21 and 28, 1940, April 2, 3 and 4, 1940, and July 11, 1940, respectively, the Estate of Roy N. Bishop, deceased, sold the securities referred [6] to in subdivision (b) of this paragraph of the kinds and for the amounts set forth in the schedule annexed hereto

and marked Exhibit B. In making such sales, said estate incurred the expenses set forth in the sixth column of said Exhibit B. At the time of the sale of said securities, all had been held for more than twenty-four months, as appears from the first column of said Exhibit B. The net proceeds of the sale of such securities were $33,686.77 less than the cost thereof as appears from the fourth, fifth and sixth columns of said Exhibit B. One half of the amount by which said cost exceeded the net proceeds of the sale of said securities constitutes a loss from the sale of community property in which petitioner had a present and existing interest equal to that of said Roy N. Bishop, and 50% of said loss is recognized and is deductible as a long-term capital loss on petitioner's return for the taxable year 1940, i.e., the sum of $8,421.69.

(e) During the year 1940 said Estate of Roy N. Bishop, deceased, paid transfer taxes of $461.48 on the sale of securities constituting community property of said decedent and petitioner and also paid a tax of $34.00 on an automobile constituting such community property; said securities and said automobile were acquired and said taxes paid with funds constituting community property of decedent and petitioner and in which petitioner had a present and existing interest, equal to that [7] of said decedent therein under the provisions of Section 161a of the Civil Code of the State of California, enacted by Chapter 265 of the California Statutes of 1927, effective July 29, 1927, and one

half of said taxes so paid were therefore deductible by petitioner, to wit, the sum of $247.74.

(f) During the year 1940 dividends and interest were received by said Estate of Roy N. Bishop from securities in various corporations held by said estate and from bank deposits thereof. Said securities had been acquired and said bank deposits made with funds constituting community property of petitioner and said Roy N. Bishop, and petitioner had a present and existing interest in said dividends and interest equal to that of said Roy N. Bishop therein under Section 161a of the Civil Code of the State of California, added by Chapter 265 of the California Statutes of 1927, effective July 29, 1927. Petitioner correctly reported as income on her 1940 return one half of the dividends so received, to wit, the sum of $2,149.55; one half of the interest on securities so received, to wit, the sum of $100.00; and one half of the interest on the bank deposits so received, to wit, the sum of $32.15, and correctly credited against her tax one half of the sum of $4.00 withheld at the source on such securities, to wit, the sum of $2.00.

(g) During the year 1940 petitioner was paid the sum of $1,928.09 by the Estate of Roy N. Bishop, deceased, as and [8] for a fee as executrix of said estate. Said fee was paid from funds in which petitioner had a present and existing interest, equal to that of said estate, so that only one half thereof, to wit, the sum of $964.05 was taxable to petitioner as reported on her return for 1940.

(h) During the year 1940 petitioner received from the Pacific Lumber Company a distribution of $8,850.00, which was reported by petitioner on her said 1940 return as a taxable dividend in full. Thereafter in January, 1944, the Commissioner of Internal Revenue determined that said distribution was 28.495% nontaxable because to that extent it was not declared out of earnings and profits of the taxable year 1940 or those accumulated subsequent to February 28, 1913, and was not a dividend. Hence petitioner's income was overstated on said return to the extent of $2,521.81 (28.495% of $8,850.00) as said Notice of Deficiency concedes. (See Statement, page 3, Adjustment (e)(2), Exhibit A.) However, petitioner also excluded from gross income on her 1940 return 5.489902% of a distribution of $720.00 ($39.53) received by her on shares of stock of the Kennecott Copper Company constituting her separate property and 5.489902% of one half of a distribution of $107.50 ($2.95) received by the Estate of Roy N. Bishop from shares of stock of the Kennecott Copper Company constituting community property of petitioner and Roy N. Bishop, believing such portions to be nontaxable because not constituting dividends. It was subsequently determined by the Commissioner of Internal Revenue that said distributions [9] were 100% taxable. Hence taxpayer understated her 1940 income by $39.53 and $2.98, respectively. Petitioner is therefore entitled to a refund of $1,198.63, as computed in Exhibit C, attached hereto.

Wherefore, the petitioner prays that this Court may hear this proceeding and determine that no deficiency of income tax for the calendar year 1940 is payable by petitioner, but on the contrary that a refund is due petitioner in the amount of $1,198.63 taxes paid.

Respectfully submitted,
HERMAN PHLEGER
THEODORE R. MEYER
Counsel for Petitioner. [10]

State of California,
City and County of San Francisco—ss.

Stella Wheeler Bishop, being first duly sworn, says that she is the petitioner above named; that she has read the foregoing Petition, and is familiar with the statements contained therein, and that the statements contained therein are true, except those stated to be upon information and belief, and that those she believes to be true.

STELLA WHEELER BISHOP

Subscribed and sworn to before me this 14th day of April, 1944.

[Seal] W. W. HEALEY
Notary Public in and for the City and County of San Francisco, State of California. [11]
My Commission expires March 3, 1946.

EXHIBIT A

Form 1230 SN-IT-1

Office of Internal Revenue Agent
in Charge
San Francisco Division
IRA:90-D
AVD

Treasury Department
Internal Revenue Service
74 New Montgomery Street
San Francisco, 5, California

Feb. 29, 1944

Mrs. Stella Wheeler Bishop,
2006 Washington Street,
San Francisco, California

Dear Mrs. Bishop:

You are advised that the determination of your income tax liability for the taxable year(s) ended December 31, 1940 discloses a deficiency of $1,070.23 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deficiency mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and for-

ward it to the Internal Revenue Agent in Charge, San Francisco, 5, California, for the attention of Conference Section. The signing and filing of this form will epedite the closing of your return(s) by permitting an early assessment of the deficiency, and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
HAROLD N. GRAVES,
Acting Commissioner,
By P. N. HARLESS
Internal Revenue Agent in Charge

Enclosures:
Statement.
Form of Waiver.
R.R.

STATEMENT

San Francisco
IRA:90-D
AVD

Mrs. Stella Wheeler Bishop
2006 Washington Street,
San Francisco, California

Tax Liability for the Taxable Year Ended December 31, 1940

	Liability	Assessed	Deficiency
Income Tax	$8,939.68	$7,869.45	$1,070.23

In making this determination of your income tax liability, it is noted that you did not avail yourself of the privilege of filing a protest.

ADJUSTMENTS TO NET INCOME

Net income as disclosed by return		$30,155.91
Unallowable deductions and additional income:		
(a) Salary	$ 964.04	
(b) Fiduciary income	2.83	
(c) Capital loss	8,421.69	
(d) Taxes paid	247.74	9,636.30
Total		$39,792.21
Nontaxable income and additional deductions:		
(e) Dividends	$4,631.83	
(f) Bank interest	32.15	
(g) Bond interest	100.00	4,763.98
Net income adjusted		$35,028.23

EXPLANATION OF ADJUSTMENTS

(a) Income from personal services is increased $964.04 due to the fact that you received a fee of $1,928.09 as executrix of the Estate of Roy N. Bishop, Deceased, instead of $964.05 as reported on your return.

(b) Income from the Roy N. Bishop, Deceased, Trust is increased $2.83 due to adjustment of the following dividends:

(1) Kennecott Copper dividend understated	$45.57
(2) Pacific Lumber Company dividend overstated	42.74
Adjustment	$ 2.83

(1) Dividends paid by Kennecott Copper Corporation in 1940 are held to be 100% taxable. Therefore the portion eliminated as nontaxable is added back to income.

(2) The dividend of $150.00 received from Pacific Lumber Corporation is held to be 28.495% nontaxable. Therefore $42.74 is eliminated from income.

(c) The deduction of $8,421.69 which you claim as your share of the long-term capital losses from the sale of community property by the executrix of your deceased husband's estate is not allowable. It is held that these losses are deductible only on the return for the estate. The amount of $18,034.99 reported on the return is therefore, reduced to $9,613.30.

(d) Deduction for taxes paid is decreased $247.74, due to the disallowance of transfer tax of $230.74 on sale of securities and automobile taxes of $17.00. These taxes paid on behalf of the Estate of Roy N. Bishop, Deceased, are not deductible on your return.

(e) Dividends are decreased $4,631.83 due to the following adjustments:

Deductions:

1. Dividends received by your husbands estate $2,149.55
2. Pacific Lumber Company dividend 2,521.81

Total $4,671.36

Addition:

3. Kennecott Copper dividend 39.53

Net adjustment $4,631.81

1. Dividends received by your husband's estate from your share of community property are taxable to the estate and not to you.
2. The dividend of $8,850.00 received from the Pacific Lumber Company is held to be 28.495% nontaxable. Therefore $2,521.81 is eliminated from taxable income.
3. Inasmuch as the dividends paid by Kennecott Copper Corporation in 1940 were 100% taxable the amount of $39.53 which you eliminated as nontaxable is restored to income.

(f) Interest on bank deposits is decreased $32.15 due to the fact that the amount received by your husband's estate from your share of community property is not taxable to you.

(g) Interest on bonds is decreased $100.00, the amount received by the estate of your husband which is not taxable to you.

(h) Income tax paid at source is decreased by $2.00, the amount withheld on community interest received by the estate of your husband which is not taxable to you.

COMPUTATION OF ALTERNATIVE TAX
(Section 117 (c) - I. R. C.)

Net income	$35,028.23
Plus: Net long-term capital loss	9,613.30
Ordinary net income	$44,641.53
Less: Personal Exemption	800.00
Balance (surtax net income)	$43,841.53
Less: Earned income credit	300.00
Net income subject to normal tax	$43,541.53
Normal tax at 4 per cent on $43,541.53	$ 1,741.66
Surtax on 43,841.53	9,322.95
Partial tax	$11,064.61
Minus: 30 per cent of net long-term loss	2,883.99
Alternative tax	$ 8,180.62

COMPUTATION OF TAX

Net income adjusted		$35,028.23
Less: Personal exemption		800.00
Balance (surtax net income)		$34,228.23
Less: Earned income credit (10% of $3,000.00)		300.00
Net income subject to normal tax		$33,928.23
Normal tax at 4% on $33,928.23		$ 1,357.13
Surtax on $34,228.23		5,975.32
Total tax (ordinary rates)		$ 7,332.45
Total tax (alternative tax in case of net long-term gain or loss)		$ 8,180.62
Defense tax (10% of $8,180.62)		818.06
Total income and defense taxes		$ 8,998.68
Less:		
(h) Income tax paid at source	$ 20.00	
Income tax paid to a foreign country or U. S. Possession	39.00	59.00
Correct income tax liability		$ 8,939.68
Income tax assessed:		
Original, account No. 854745—First California		7,869.45
Deficiency of income tax		$ 1,070.23

EXHIBIT B

STELLA WHEELER BISHOP

Gain or Loss from Sale of Capital Assets held by the Executors of the Estate of Roy N. Bishop During the Year 1940 Which Property Constituted Community Property in Which Mrs. Bishop had an Equal Existing and Present Interest

	Shares	Date Aquired	Date Sold	Sales Price	Cost	Expenses	Gain or Loss
American Cyanamid Co. "B"	50	7-24-37	3-19-40	$ 1,906.25	$ 1,700.25	$ 13.10	$ 192.90
American Locomotive Company	30	7-24-37	3-20-40	615.00	1,436.45	7.80	*825.25*
Bliss, E. W. Co.	100	7-24-37	3-18-40	1,462.50	1,680.25	19.30	*237.05*
Caterpillar Tractor Co.	30	7-26-37	3-18-40	1,522.50	2,974.20	9.00	*1,460.70*
Houston Oil Co. of Texas	100	7-24-37	4- 2-40	562.50	1,592.75	13.30	*1,043.55*
Hudson Bay Mining & Smelting Co.	50	7-27-37	3-18-40	1,162.50	1,587.75	12.80	*438.05*
Kennecott Copper Corp.	30	7-24-37	3-21-40	1,091.25	1,772.62	7.50	*688.87*
Link Belt Co.	40	7-26-37	4- 4-40	1,505.00	2,365.35	10.60	*870.95*
Ohio Oil Company	150	7-24-37	3-28-40	1,043.75	3,107.95	20.80	*2,085.00*
Phillips Petroleum Co.	70	7-24-37	3-18-40	2,738.75	4,463.15	17.50	*1,741.90*
Pure Oil Company	500	10-29-37	3-18-40	4,687.50	7,587.50	81.50	*2,981.50*
Remington Rand, Inc.	1,000	10-29-37	3-18-40	9,912.50	16,012.50	172.00	*6,272.00*
Simmons Company	50	7-26-37	3-18-40	1,068.75	2,519.15	12.80	*1,463.20*
Suisun Slough Land Co.	60	4-20-31	7-11-40	785.83	11,800.00	11.18	*11,025.35*
Westinghouse Airbrake Co.	30	7-26-37	4- 3-40	723.75	1,332.10	7.80	*616.15*
Youngstown Sheet & Tube Co.	40	7-24-37	3-28-40	1,625.00	3,740.55	10.60	*2,126.15*
Total				$32,413.33	$65,672.52	$427.58	*$33,686.77*

[Printer's Note]: Figures in italic printed in red.

EXHIBIT C

COMPUTATION OF AMOUNT OF REFUND DUE PETITIONER

Net Income as disclosed by return		$30,155.91
Additions:		
Adjustment (b)	$ 2.83	
Adjustment (e)-3	39.53	
Kennecott Copper Co. dividend adjustment—par. V-h of petition	2.95	45.31
		$30,201.22
Deductions:		
Adjustment (c)-2		2,521.81
Net income as adjusted		$27,679.41

COMPUTATION OF ALTERNATIVE TAX
(Section 117(c) I.R.C.)

1.	Net income	$27,679.41
2.	Plus: net long-term capital loss	18,034.99
		$45,714.40
3.	Less: personal exemption	800.00
4.	Surtax net income	$44,914.40
5.	Less: earned income credit	300.00
6.	Net income subject to normal tax	$44,614.40
7.	Normal tax (4% of item 6)	1,784.58
8.	Surtax ($9,380.00 plus 40% of $914.40)	9,745.76
9.	Partial tax under §117(c) I.R.C.	$11,530.34
10.	Less: 30% x $18,034.99	5,410.50
11.	Alternative tax	$ 6,119.84

COMPUTATION OF TAX WITHOUT REFERENCE TO SECTION 117 (c)

1. Net income as adjusted		$27,679.41
2. Less: personal exemption		800.00
3. Surtax net income		$26,879.41
4. Less: earned income credit		300.00
5. Net income subject to normal tax		$26,579.41
6. Normal tax (4% of item 5)		1,063.17
7. Surtax ($3,440.00 plus 30% of $879.41)		3,703.82
8. Total tax		$ 4,766.99
Income tax		$ 6,119.84
Defense tax (10%)		611.98
Total		$ 6,731.82
Less:		
Income tax paid at source	$ 22.00	
Income tax paid to a foreign country or U. S. possession	39.00	61.00
Correct tax liability for 1940		$ 6,670.82
Amount paid		$ 7,869.45
		6,670.82
Amount of refund payable		$ 1,198.63

[Endorsed]: T.C.U.S. Filed April 20, 1944.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed by the

above-named petitioner, admits and denies as follows:

I.

Admits the allegations contained in paragraph I. of the petition.

II.

Admits the allegations contained in paragraph II. of the petition.

III.

Admits that the taxes in controversy are income taxes for the calendar year 1940 in the amount of $1,070.23, but denies the remaining allegations contained in paragraph III. of the petition.

IV.

1 to 5, inclusive. Denies that the Commissioner erred in the determination of the deficiency, as alleged in subparagraphs [20] 1 to 5, inclusive, of paragraph IV. of the petition.

V.

(a) to (c), inclusive. For lack of information, denies the allegations contained in subparagraphs (a) to (c), inclusive of paragraph V. of the petition.

(d) Admits that on March 18, 19, 20, 21 and 28, 1940, April 2, 3 and 4, 1940, and July 11, 1940 the Estate of Roy N. Bishop, deceased, sold securities, the net proceeds of the sale from which constituted a loss which was deducted as a long-term capital loss on petitioner's return for the taxable year 1940 in the sum of $8,421.69, but denies the remaining

allegations contained in subparagraph (d) of paragraph V. of the petition.

(e) Admits that during the year 1940 said Estate of Roy N. Bishop, deceased, paid transfer taxes of $461.48 on the sale of securities, and also paid a tax of $34.00 on an automobile, but denies the remaining allegations contained in subparagraph (e) of paragraph V. of the petition.

(f) Admits that during the year 1940 dividends and interest were received by said Estate of Roy N. Bishop from securities in various corporations held by said estate and from bank deposits therefor, but denies the remaining allegations contained in subparagraph (f) of paragraph V. of the petition.

(g) Admits that during the year 1940 petitioner was paid the sum of $1,928.09 by the Estate of Roy N. Bishop, deceased, as and for a fee as executrix of said estate, but denies the remaining allegations contained in subparagraph (g) of paragraph V. of the petition.

(h) Admits the allegations contained in subparagraph (h) of paragraph V. of the petition, except that the allegation "hence taxpayer understated her 1940 income by $39.53 and $2.95, respectively, and that petitioner is therefore entitled to a refund of $1,198.63, as computed in Exhibit C" attached to the petition, is specifically denied.

VI.

Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

(Signed) J. P. WENCHELL, TMM
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

T. M. MATHER,
Special Attorney, Bureau of Internal Revenue

TMM/vg 5-8-44

[Endorsed]: T.C.U.S. Filed May 15, 1944. [22]

[Title of Tax Court and Cause.]

STIPULATION

It Is Hereby Stipulated and Agreed by and between the parties hereto, through their respective attorneys, that the following facts (in addition to the facts alleged by the petition on file herein that are admitted by the answer on file herein) shall be taken to be true and received as evidence for all purposes of this proceeding, without prejudice to the right of either party to introduce any further evidence not inconsistent with the facts herein stipulated:

(1) Petitioner and Roy N. Bishop were married on the 9th day of May, 1907, and remained married continuously thereafter until the 20th day of De-

cember, 1938, when said Roy N. Bishop died. Said [23] Roy N. Bishop and petitioner Stella Wheeler Bishop were residents of, and domiciled in, the State of California continuously from the year 1909 to the 20th day of December, 1938, in the case of said Roy N. Bishop, and to the present time in the case of petitioner.

(2) Between April 20, 1931 and October 29, 1937, petitioner and said Roy N. Bishop acquired securities of the kinds and in the amounts, and for the costs and on the dates, set forth in the schedule attached to this stipulation and marked "Exhibit A"; and none of said securities was disposed of until they were sold by petitioner Stella Wheeler Bishop and Crocker First National Bank of San Francisco, as executrix and executor, respectively, of the Will and estate of said Roy N. Bishop, as hereinafter set forth.

(3) Thereafter, on December 20, 1938, said Roy N. Bishop died and on January 9, 1939, the Will of said Roy N. Bishop, deceased, was admitted to probate by the Superior Court of the State of California, in and for the City and County of San Francisco. Said Will named petitioner and Crocker First National Bank of San Francisco as executrix and executor, respec- [24] tively, of the Will and estate of said Roy N. Bishop, deceased.

(4) Thereafter, petitioner Stella Wheeler Bishop and Crocker First National Bank of San Francisco, as executrix and executor, respectively, of the Will and estate of said Roy N. Bishop, deceased, sold the securities referred to in paragraph 2 of this stipula-

tion, for the amounts and on the dates set forth in said "Exhibit A". In making such sales, the expenses set forth in the sixth column of said "Exhibit A" were incurred. The net proceeds of the sale of such securities were $33,686.77 less than the cost thereof as appears from the fourth, fifth and sixth columns of said "Exhibit A." The fair market value of said securities on December 20, 1938 is set forth in the eighth column of said "Exhibit A"; and the net proceeds of sale of said securities was $7,749.40 less than the fair market value thereof on December 20, 1938.

(5) At the time said Roy N. Bishop died, and at all times herein mentioned prior thereto, the securities referred to in paragraphs (2) and (4) of this stipulation, the securities and automobile referred to in paragraph V(e) of the petition on file herein, and the securities and bank deposits referred to in paragraph V(f) of said petition, constituted community property of said Roy N. Bishop and petitioner acquired subsequent to July 29, 1927 and no part thereof was [25] acquired as or from the proceeds of any property owned by said Roy N. Bishop and petitioner, or either of them, on or before July 29, 1927.

(6) The transfer taxes and automobile tax referred to in paragraph V(e) of the petition on file herein, the executrix fee referred to in paragraph V(g) of the petition on file herein, and the funds used to pay the expenses of sale of the securities referred to in paragraphs (2) and (4) of this stipulation, were all paid either out of funds on

hand at the time said Roy N. Bishop died, and at such time and at all times prior thereto, constituting community property of petitioner and said Roy N. Bishop acquired subsequent to July 29, 1927, or were paid out of funds representing the proceeds of or income from such property; and no part of such funds was acquired prior to July 29, 1927 or as proceeds of income from any property owned by said Roy N. Bishop and petitioner, or either of them, on or before July 29, 1927.

(7) Petitioner filed her federal income tax return for the calendar year 1940 on March 15, 1941, and on the same day paid the amount of tax shown to be due thereon, to wit, $7869.45.

Dated September 18, 1944.

HERMAN PHLEGER,
THEODORE R. MEYER,
ROBERT H. WALKER,
Counsel for Petitioner.
J. P. WENCHEL, TMM
Chief Counsel, Bureau of Internal Revenue,
Counsel for Respondent. [26]

EXHIBIT A

	1	2	3	4	5	6	7	8
	Shares	Date Acquired	Date Sold	Sales Price	Cost	Expenses	Gain or Loss	December 20, 1938 Fair Market Value
American Cynamid Co. "B"	50	7-24-37	3-19-40	$1,906.25	$ 1,700.25	$ 13.10	$ 192.90	$ 1,350.00
American Locomotive Company	30	7-24-37	3-20-40	615.00	1,436.45	7.80	*829.25*	817.50
Bliss, E. W. Co.	100	7-24-37	3-18-40	1,462.50	1,680.25	19.30	*237.05*	1,262.50
Caterpillar Tractor Co.	30	7-26-37	3-18-40	1,522.50	2,974.20	9.00	*1,460.70*	1,357.50
Houston Oil Co. of Texas	100	7-24-37	4- 2-40	562.50	1,592.75	13.30	*1,043.55*	737.50
Hudson Bay Mining & Smelting Co.	50	7-27-37	3-18-40	1,162.50	1,587.75	12.80	*438.05*	1,631.25
Kennecott Copper Corp.	30	7-24-37	3-21-40	1,091.25	1,772.62	7.50	*688.87*	1,262.65
Link Belt Co.	40	7-26-37	4- 4-40	1,505.00	2,365.35	10.60	*870.95*	1,760.00
Ohio Oil Company	150	7-24-37	3-28-40	1,043.75	3,107.95	20.80	*2,085.00*	1,406.25
Phillips Petroleum Co.	70	7-24-37	3-18-40	2,738.75	4,463.15	17.50	*1,741.90*	2,940.00
Pure Oil Company	500	10-29-37	3-18-40	4,687.50	7,587.50	81.50	*2,981.50*	5,187.50
Remington Rand, Inc.	1,000	10-29-37	3-18-40	9,912.50	16,012.50	172.00	*6,272.00*	15,500.00
Simmons Company	50	7-26-37	3-18-40	1,068.75	2,519.15	12.80	*1,463.20*	1,575.00
Suisun Slough Land Co.	60	4-20-31	7-11-40	785.83	11,800.00	11.18	*11,025.35*	
Westinghouse Airbrake Co.	30	7-26-37	4- 3-40	723.75	1,332.10	7.80	*616.15*	862.50
Youngstown Sheet & Tube Co.	40	7-24-37	3-28-40	1,625.00	3,740.55	10.60	*2,126.15*	2,085.00
		Total		$32,413.33	$65,672.52	$427.58	*$33,686.77*	$39,735.15

[Printer's Note]: Figures in italic printed in red.

[Endorsed]: T.C.U.S. Filed Sept. 18, 1944.

[Title of Tax Court and Cause.]

Promulgated January 16, 1945

Held, that one-half of the loss sustained upon the sale, in the course of administration, of securities acquired since 1927 and owned as community property in California, is not deductible in the return of the surviving spouse. Commissioner v. Larson, 131 Fed. (2d) 85; Estate of James F. Waters, 3 T. C. 407, followed.

Robert H. Walker, Esq., for the petitioner.

T. M. Mather, Esq., for the respondent.

The respondent determined a deficiency of $1,070.23 in the petitioner's income tax for the year 1940. The petitioner cites as error respondent's action in denying as a deduction one-half of a loss sustained upon the sale by her husband's executor of securities acquired since 1927 and owned as community property; one-half of the taxes and expenses paid by the executors of her husband's estate and the elimination from the petitioner's income of one-half of the executrix' fee received by her. Consistent with these [28] claims petitioner's position is that one-half of the income from taxable dividends and interest received by the estate during the administration is taxable to her.

FINDINGS OF FACT

The facts were stipulated and as so stipulated they are adopted as findings of fact. In so far as they are material to the issue, they are as follows:

The petitioner is an individual residing in San Francisco, California. She filed her income tax re-

turn for the year 1940 with the Collector of Internal Revenue for the first district of California.

The petitioner and Roy N. Bishop were married on the 9th day of May, 1907, and remained married continuously thereafter until the 20th day of December, 1938, when Roy N. Bishop died. Roy N. Bishop and the petitioner, Stella Wheeler Bishop, were residents of, and domiciled in, the State of California continuously from the year 1909 to the 20th day of December, 1938. The petitioner has continued that status to the present time.

Between April 20, 1931 and October 29, 1937, the petitioner and Roy N. Bishop acquired certain securities at an aggregate cost of $65,672.52. Such securities were not disposed of until they were sold by the petitioner and Crocker First National Bank of San Francisco, hereinafter called the bank, as executrix and executor, respectively, of the will and estate of Roy N. Bishop.

Thereafter, on December 20, 1938, Roy N. Bishop died and on January 9, 1939, his will was admitted to probate by the Superior Court of the State of California, in and for the City and County of San Francisco. The will named the petitioner and the bank as executrix and executor, respectively, of the will and estate of said Roy N. Bishop, deceased.

Thereafter, the petitioner and the bank, as executrix and executor, respectively, of the said estate, sold the securities heretofore mentioned at an aggregate loss of $33,686.77.

At the time Roy N. Bishop died, and at all times herein mentioned prior thereto, the securities above

referred to, an automobile on which the estate paid a tax of $34, and certain other securities and bank deposits, on which dividends and interest were received by the estate in 1940, constituted community property of Roy N. Bishop and the petitioner acquired subsequent to July 29, 1927, and no part thereof was acquired as or from the proceeds of any property owned by Roy N. Bishop and the petitioner, or either of them, on or before July 29, 1927. During 1940 the estate paid transfer taxes of $461.48 on such property and an automobile tax of $34, and it received dividends of $4,299.11 from securities and interest amounting to $132.15 on bonds and bank deposits belonging to the estate. It was agreed that the dividends from Pacific Lumber Company were nontaxable to the amount of 28.495 per cent. During that year the petitioner received a fee of $1,928.09 as executrix of the estate.

The transfer taxes and automobile tax, the executrix fee, and the funds used to pay the expenses of sale of the securities, were all paid either out of funds on hand at the time Roy N. Bishop died, and at such time and at all times prior thereto, constituting community property of the petitioner and Roy N. Bishop acquired subsequent to July 29, 1927, or were paid out of funds representing the proceeds of or income from such property. No part of such funds was acquired prior to July 29, 1927, or as proceeds of or income from any property owned by Roy N. Bishop and the petitioner, or either of them, on or before July 29, 1927.

In her income tax return for 1940, the petitioner claimed $8,421.69 as one-half of the recognizable loss from the sale of securities and a [30] deduction of $247.74 representing one-half of the taxes so paid. She reported as income her one-half of the dividends and interest so received. She also reported her one-half of her fee as executrix.

The Commissioner disallowed the deductions claimed, excluded from her income the dividend and interest items and included therein the entire sum received as her fee as executrix.

The petitioner claimed credit for income tax of $22 paid at the source but the Commissioner reduced such sum to $20 on the ground that $2 applied to community property interest received by the estate.

OPINION

Arundell, Judge: The basic issue in this case presents a clear-cut question whether one-half of the loss upon the sale of community property acquired since 1927 in California while the estate of the husband is in the process of administration can be taken as a deduction by the surviving spouse.

While the precise question presented for decision has not been directly decided by the 9th Circuit Court of Appeals, we think that the Court's decision in Commissioner v. Larson, 131 Fed. (2d) 85, would require an answer contrary to petitioner's contention. In that case the Court had under consideration a Washington statute substantially similar to the California statute here involved and in its opinion reached the conclusion that because the

entire estate was subject to administration in the estate of the deceased husband, the income was "owned" by the executor or administrator and should be returned in its entirety by him. The same question was implicit in this Court's decision in the Estate of James F. Waters, 3 T.C. 407, though the question was not there directly decided.

We have always felt particularly impelled to strictly follow a Circuit Court's decision on questions of local law peculiarly within its knowledge and experience. Helvering v. Stuart, 317 U.S. 154. As we understand Commissioner v. Larson, supra, and Rosenberg v. Commissioner, 115 Fed. (2d) 910, which latter case was also decided by the 9th Circuit, the income from community property during the period of the administration is taxable in its entirety to the executor or administrator and one-half of it may not be returned by the surviving spouse.

It follows that the entire loss resulting from the sale of securities by the executor must be taken as a deduction by the latter and one-half of the loss may not be deducted by the surviving spouse in computing her tax. The same treatment must be accorded the expenses and taxes paid by the executor, which requires their deduction in full by the executor and no part of them may be deducted by the petitioner.

In another issue the petitioner asks to be relieved from including in her income one-half of the fee received by her as executrix of her husband's estate. We see no merit in her contention. The fee was paid to her for personal services rendered in her

personal capacity as a fiduciary. We may assume that the amount of the fee was fixed by the probate court as proper compensation for such services performed in connection with the settlement of the Roy N. Bishop Estate and that the action of the court was completely in accord with the significance and effect of the community property laws of California. Petitioner has not proved the fee to be in part excludible from her income. Therefore, the full amount of the fee must be included in her taxable income.

Reviewed by the Court.

Decision will be entered under Rule 50. [32]

Van Fossan J., dissenting: The majority opinion concedes that the precise question here posed has not been decided by either the Circuit Court of Appeals for the Ninth Circuit nor by The Tax Court, but nevertheless feels bound by the rationale of Commissioner v. Larson, 131 Fed. (2d) 85, and Estate of James F. Waters, 3 T.C. 407. Feeling that these cases are not authority for the conclusion reached by the majority, I must dissent. I shall set out my views at some length.

It may be helpful to place the situation existing in California before 1927 and that obtaining after that date in juxtaposition. Prior to 1927, during the lifetime of the husband the wife had only an expectancy in community property. Thereafter, "the respective interests of husband and wife in community property during continuance of the marriage relation are present, existing and equal interest under the management and control of the

husband." (Section 161a, Civil Code of California)[1]. Prior to 1927 all income from community property was taxable to the husband. United States v. Robbins, 269 U.S. 315. Thereafter, the wife was entitled to return for taxation one-half of the income from the community property. United States v. Malcolm, 282 U. S. 792. Prior to 1923, Section 1402, Civil Code of California, provided, "upon the death of the husband one-half of [33] the community property *goes* to the suriviving wife, and the other half is subject to the testamentary disposition of the husband, and in the absence of such disposition, goes to his descendants * * *." Since 1923 the statutes of California have provided, "upon the death of either husband or wife, one-half of the community property *belongs* to the surviving spouse; the other half is subject to the testamentary disposition of the decedent * * *."[2] [Italics supplied.]

---

[1] The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property. [Section 161a, Civil Code of California.]

[2] Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of sections 202 and 203 of this code. [Section 201, Probate Code of California.]

If anything is basic in income tax law, it is that ownership of property determines the taxability of income earned by, or derived from, it. Blair v. Commissioner, 300 U. S. 5; Helvering v. Clifford, 309 U. S. 331. See Poe v. Seaborn, 182 U. S. 101, where the Supreme Court held that a husband's power of control over community property under Washington law does not amount to ownership of the entire community property, stating, "the law's investiture of the husband with broad powers by no means negatives the wife's present interest as a co-owner", and departing from the alternative reasoning employed in United States v. Robbins, supra. The court laid down the proposition that the word "of" in the phrase "the net income of every individual" denotes ownership and that ownership is the test of taxability.

Since 1927 the interests of husband and wife in community property in California have been "present, existing and equal". Each owns one-half and is entitled to return one-half of the income. United States v. Malcolm, [34] supra. Since 1923 it has been the law of California, as provided by section 201 of the Probate Code, that "upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse." These are words of ownership, definite, certain and absolute. The share of the surviving spouse is not includible in the taxable estate of the decedent. United States v. Goodyear, 99 Fed. (2d) 523. The logic of the situation would seem to be irresistible. If, because of ownership of the property, and not-

withstanding control of the same by the husband, each spouse is entitled to return one-half of the income therefrom during the existence of the marriage relationship and since by the statute the surviving widow owns one-half of the community property after the death of her husband and notwithstanding the control by the executor during administration, such one-half is exempted from estate tax, she should be entitled to return as her own the income from such property during administration.

In Commissioner v. Larson, 131 Fed. (2d) 85, the case chiefly relied on by the majority, arising in the State of Washington, the income from community property during the administration was involved. There the court said:

We think the test of ownership is applicable here. In determining who the owner of the income is, state law is apparently applicable. We therefore turn to state law to determine whether the executor alone, or the executor and the surviving spouse together, own the community income.

Pierce's Code, 1933, §9863, provides that title to realty vests immediately in the heirs or devises who are entitled to the rents, issues and profits thereof as against "any person except the executor or administrator and those lawfully [35] claiming under such executor, or administrator". By §9885 the executor or administrator is entitled to institute suit to collect any debts due the estate or to recover any property, real or personal. It has been repeatedly said that upon the death of either spouse, the entire community estate, and not merely the half interest

of decedent, is subject to administration. In addition, title to the personal property vests in the executor or administrator. Deveraux v. Anderson, 146 Wash. 651, 264 P. 423, 424.

The court then held that under the provisions of Washington statutes, the ownership of the income from community property during administration and liquidation was in the executor or administrator and that he should report the income in the return of the estate. Although the decision was adverse because of State law, the reasoning of the opinion clearly supports the conclusion that ownership is the controlling factor.

Under the statutes of California, the surviving spouse acquired the ownership of one-half of the community property at the time of purchase (Section 161a, Civil Code of California) and continued to own that interest after the death of the other spouse (Section 201, Probate Code), thus presenting a very different situation.

The Estate of James F. Waters, 3 T.C. 407, is not inconsistent with this view.[3] There the estate re-

[3] Section 581, Probate Code of California, was cited (in error, I believe) to support the dictum in the Waters case that "the income from the entire community property during the period of administration goes to the executor or administrator." The statute reads: "The executor or administrator is entitled to the possession of all of the real and personal property of the decedent and to receive the rents, issues and profits thereof until the estate is settled or until delivered over by order of the court to the heirs, devisees or legatees * * *." The section

turned all of the income. In the notice [36] of deficiency the Commissioner, obviously relying on G.C.M. 20742 then in effect, divided the income one-half to the estate and one-half to the widow, but held that the basis for gain on the widow's one-half of the property was the fair market value at date of death and not cost to the community, as claimed by the taxpayer. At the hearing, again obviously relying on G.C.M. 23811, which had revoked G.C.M. 20742, counsel for the Commissioner reversed his position, abandoned his contention that the income should be returned one-half by each the estate and the widow, and embraced the theory of the tax return, i. e., that the estate should return all of the income. The parties were thus in agreement that a single return by the estate should be made and posed for our decision only the narrow question of the basis of the property belonging to the widow.

Viewing the agreed posture of the parties as presenting no issue, we decided that as to the widow's share the basis was the cost to the community, as adjusted, and not the market value at the time of the husband's death. A word of warning was uttered as to possible implications of the opinion by

---

obviously relates only to the property of the decedent and does not include the community property owned by the other spouse. Section 202, Probate Code, provides: "Community property passing from the control of the husband either by reason of his death or by virtue of testamentary disposition by the wife is subject to his debts and to administration and disposal under the provisions of Division III of this Code; * * *."

Judge Opper in a concurring opinion but being in agreement with the result reached on the narrow question presented, he did not dissent. When the narrowness of the issue is remembered and the posture of the parties is appreciated, the conclusion reached is thought to support, rather than oppose, the view I take in the case at bar. In both the prevailing and concurring opinions the controlling thought is the ownership of the property.

Two other cases are relied on by the respondent. They are Rosenberg v. Commissioner, 115 Fed. (2d) 910, and Barbour v. Commissioner, 89 Fed. (2d) 434. [37]

The Rosenberg case dealt exclusively with the rights of the surviving spouse in California community property acquired prior to 1927 when the wife had a mere expectancy and does not purport to decide the question presently before us.

The Barbour case arose in Texas, where the State law (Article 3630, Revised Civil Statutes of Texas, 1925) provides that "until such partition is applied for and made, the executor or administrator of the deceased shall recover possession of all such common property and hold the same in trust for the benefit of the creditors and others entiteld thereto." The California law contains no such provision but, as above pointed out, by Section 201, Probate Code of California, decrees that upon the husband's death one-half of the community "*belongs to the surviving spouse.*" [Italics supplied.]

The law of California confirms in the surviving spouse the ownership of one-half of the community property. I am of the opinion that such ownership

entitles her to report one-half of the income of such community property. It follows that the petitioner should be entitled to deduct from her gross income one-half of the loss sustained on the sale of the community property securities during the period of administration.

Mellott, Arnold, Disney and Opperz, JJ., agree with this dissent. [38]

[Title of Tax Court and Cause.]

RESPONDENT'S COMPUTATION FOR ENTRY OF DECISION

The attached proposed computation is submitted, on behalf of the respondent, to the Tax Court of the United States, in compliance with its opinion determining the issues in this proceeding.

This computation is submitted in accordance with the opinion of the Court, without prejudice to the respondent's right to contest the correctness of the decision entered herein by the Court, pursuant to the statutes in such cases made and provided.

(Signed) J. P. WENCHEL, TMM
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

B. H. NEBLETT,
Division Counsel.

T. M. MATHER,
Special Attorney,
Bureau of Internal Revenue.

TMM/ftc 2/5/45 [39]

C:TS:PD Recomp.
SF:TMM:WPE

AUDIT STATEMENT

In re Stella Wheeler Bishop
San Francisco, California

Docket No. 4594

Deficiency letter dated February 29, 1944

Tax Liability for the Taxable Year Ended December 31, 1940

	Liability	Assessed	Deficiency
Income Tax	$8,939.68	$7,869.45	$1,070.23

Recomputation of tax liability prepared in accordance with the opinion of The Tax Court of the United States promulgated January 16, 1945.

ADJUSTMENT TO NET INCOME

Net income as disclosed in the deficiency notice dated February 29, 1944	$35,028.23
Adjustment made in accordance with the opinion of The Tax Court of the United States promulgated January 16, 1945	None

COMPUTATION OF ALTERNATIVE TAX
(Section 117 (c) - I. R. C.)

Net income	$35,028.23
Plus: Net long-term capital loss	9,613.30
Ordinary net income	$44,641.53
Less: Personal exemption	800.00
Balance (surtax net income)	$43,841.53
Less: Earned income credit	300.00
Net income subject to normal tax	$43,541.53
Normal tax at 4 per cent on $43,541.53	$ 1,741.66
Surtax on $43,841.53	9,322.95
Partial tax	$11,064.61
Minus: 30 per cent of net long-term loss	2,883.99
Alternative tax	$ 8,180.62

COMPUTATION OF TAX

Net income adjusted		$35,028.23
Less: Personal exemption		800.00
Balance (surtax net income)		$34,228.23
Less: Earned income credit (10% of $3,000.00)		300.00
Net income subject to normal tax		$33,928.23
Normal tax at 4% on $33,928.23		$ 1,357.13
Surtax on $34,228.23		5,975.32
Total tax (ordinary rates)		$ 7,332.45
Total tax (alternative tax in case of net long-term gain or loss)		$ 8,180.62
Defense tax (10% of $8,180.62)		818.06
Total income and defense taxes		$ 8,998.68
Less:		
Income tax paid at source	$ 20.00	
Income tax paid to a foreign country or U. S. Possession	39.00	59.00
Correct income tax liability		$ 8,939.68
Income tax assessed:		
Original, account No. 854745—First California		$ 7,869.45
Deficiency of income tax		$ 1,070.23

WPE:em - 2/2/45

[Endorsed]: T.C.U.S. Filed Feb. 15, 1945.

The Tax Court of the United States
Washington

Docket No. 4594

STELLA WHEELER BISHOP,
Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION

Pursuant to the Opinion of the Court promulgated January 16, 1945, the respondent herein, on February 15, 1945, filed a recomputation for entry of decision. Hearing was had thereon on March 28, 1945, at which time the recomputation filed by the respondent was not contested by the petitioner. Wherefore, it is

Ordered and Decided: That for the calendar year 1940 there is a deficiency in income tax in the amount of $1,070.23.

Entered March 29, 1945.

[Seal] (Signed) C. R. ARUNDELL
Judge. [43]

[Title of Tax Court and Cause.]

PETITION FOR REVIEW BY THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

I.

JURISDICTION AND VENUE

Your petitioner, Stella Wheeler Bishop, respectfully petitions the United States Circuit Court of Appeals for the Ninth Circuit to review the decision and order of The Tax Court of the United States rendered on March 29, 1945, in the above proceeding, finding a deficiency of income tax due from your petitioner in the amount of $1,070.23 for the calendar year 1940.

The return of income tax in respect of which said alleged tax liability arose was filed by your petitioner on March 15, 1941, with the Collector of Interna Revenue for the [44] First Collection District of California, located in the City and County of San Francisco, California, which is located within the jurisdiction of the United States Circuit Court of Appeals for the Ninth Circuit.

Jurisdiction in this court to review said decision of The Tax Court of the United States is founded on Sections 1141 and 1142 of the Internal Revenue Code.

II.

NATURE OF THE CONTROVERSY

Petitioner and Roy N. Bishop, deceased, were married on May 9, 1907, and remained married continuously thereafter until December 20, 1938, when Roy N. Bishop died. From 1909 to the latter date petitioner and Roy N. Bishop were residents of and domiciled within the State of California.

At the time Roy N. Bishop died, he and petitioner were the owners of certain corporate stocks which constituted community property under the laws of the State of California, acquired after July 29, 1927. In the year 1940, while the administration of the Estate of Roy N. Bishop, Deceased, was still pending, petitioner and Crocker First National Bank of San Francisco, as executors of his will, sold said stocks for a sum of $33,686.77 less than their cost.

The Commissioner of Internal Revenue determined, and the Tax Court held, that the entire loss on the sale of said stocks was deductible in computing the net income of the Estate of Roy N. Bishop, Deceased, for the year 1940, and that no part thereof was deductible by petitioner in computing her net income [45] for the year 1940.

Petitioner was the owner of an undivided one-half interest in said stocks during the life of Roy N. Bishop; her ownership continued after his death and was not divested thereby; and she contends that as such owner she was entitled to deduct one-half of the loss sustained on the sale of said stocks, in computing her net income for the year 1940.

The Commissioner also determined, and the Tax Court held, that petitioner was taxable upon the full amount, to-wit $1,928.09, of the fee received by her in 1940 as executrix of the will of Roy N. Bishop. Said fee was paid either out of funds on hand at the time Roy N. Bishop died, and at such time and at all times prior thereto constituting community property of petitioner and Roy N. Bishop acquired subsequent to July 29, 1927, or out of funds representing the proceeds of or income from such property. Petitioner was therefore the owner of an undivided one-half interest in and to the funds out of which said fee was paid, and petitioner contends that consequently only one-half of said fee constituted income taxable to her.

The Commissioner also determined, and the Tax Court held, that transfer taxes of $461.48 paid by the Estate of Roy N. Bishop, Deceased, on the sale of securities which at the time of the death of Roy N. Bishop constituted community property of petitioner and Roy N. Bishop acquired after July 29, 1927, and a tax of $34.00 paid by said estate on an automobile constituting such community property, were deductible solely by the estate, [46] and no part thereof was deductible by petitioner. Said taxes were paid either out of funds on hand at the time Roy N. Bishop died and at such time and at all times prior thereto constituting community property of petitioner and Roy N. Bishop acquired subsequent to July 29, 1927, or out of funds representing the proceeds of or income from such property. Petitioner was therefore the owner of an un-

divided one-half interest in and to such securities and said automobile, and in and to the funds from which said taxes were paid, and petitioner contends that she was consequently entitled to deduct one-half of such taxes in computing her net income for the year 1940.

The Commissioner determined, and the Tax Court held, that the Estate of Roy N. Bishop, Deceased, was entitled to the full amount of a credit of $4 for income tax withheld at source in 1940 on tax-free covenant bonds which at the time of Roy N. Bishop's death constituted community property of petitioner and Roy N. Bishop acquired after July 29, 1927. Petitioner was the owner of an undivided one-half interest in and to said bonds and the income therefrom, and petitioner contends that she was therefore entitled to one-half of said credit, or $2.

If the foregoing points are decided in petitioner's favor, petitioner is entitled to a refund of $1,198.63 for the year 1940, on account of a reduction in the taxable amount of a dividend received by petitioner from Pacific Lumber Company, which reduction respondent concedes is correct.

Wherefore, your petitioner prays that this Honorable [47] Court may review said decision and order of The Tax Court of the United States and reverse the same, and remand the proceeding to The Tax Court of the United States for a determination of the amount of the refund to which petitioner is entitled for the year 1940, and for the entry of such further orders and directions as shall

by this court be deemed meet and proper in accordance with law.

Dated June 13, 1945.

Respectfully submitted,
HERMAN PHLEGER
THEODORE R. MEYER
ROBERT H. WALKER
Attorneys for Petitioner.

[Endorsed]: T.C.U.S. Filed June 18, 1945. [48]

[Title of Tax Court and Cause.]

NOTICE OF FILING PETITION FOR REVIEW

To the Commissioner of Internal Revenue, and to the Chief Counsel, Bureau of Internal Revenue, Washington, D. C.:

You are hereby notified that on the 18th day of June, 1945, a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit of the decision of The Tax Court of the United States heretofore rendered in the above entitled cause was filed with the Clerk of The Tax Court of the United States. A copy of the petition as filed is attached hereto and served upon you.

Dated June 18, 1945.

HERMAN PHLEGER
THEODORE R. MEYER
ROBERT H. WALKER
Attorneys for Petitioner [49]

Service and receipt of a copy of the foregoing Notice of Filing Petition for Review and of a copy of said Petition for Review attached thereto is hereby acknowledged by each of the undersigned this 18th day of June, 1945.

J. D. NEWMAN, Jr.
Commissioner of Internal Revenue
J. P. WENCHELL
Chief Counsel, Bureau of Internal Revenue
Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed June 18, 1945. [50]

In the United States Circuit Court of Appeals for the Ninth Circuit

[Title of Tax Court and Cause.]

STATEMENT OF POINTS RELIED UPON ON PETITION FOR REVIEW

Petitioner relies on the following points in petitioning for review of the decision of The Tax Court of the United States in the above entitled proceeding:

The Tax Court of the United States erred in deciding that the entire loss sustained upon the sale of certain corporate stocks by petitioner and Crocker First National Bank of San Francisco, as executors of the will of Roy N. Bishop, deceased, was deductible by the Estate of Roy N. Bishop,

Deceased, in computing the net income of the estate for the year 1940, and that no part of the loss was deductible by petitioner. During the lifetime of Roy N. Bishop petitioner was the owner of an undivided one-half interest in and to said stocks, which constituted California community property acquired after July 29, 1927; her ownership was not divested by the death of Roy N. Bishop; and petitioner contends that as the owner of an undivided [51] one-half interest in and to said stocks she was entitled to deduct one-half the loss sustained thereon in computing her net income for the year 1940.

The Tax Court of the United States also erred in deciding that petitioner was taxable on the full amount, to-wit, $1,928.09, of the fee received by her in 1940 as executrix of the will of Roy N. Bishop. said fee was paid either out of funds on hand at the time Roy N. Bishop died, and at such time and at all times prior thereto constituting community property of petitioner and Roy N. Bishop acquired subsequent to July 29, 1927, or out of funds representing the proceeds of or income from such property. Petitioner was therefore the owner of an undivided one-half interest in and to the funds out of which said fee was paid; and petitioner contends that consequently only one-half of such fee constituted income taxable to her.

The Tax Court of the United States also erred in deciding that transfer taxes of $461.48 paid by the Estate of Roy N. Bishop on the sale of securities which constituted community property of petitioner and Roy N. Bishop at the time of his

death, and which were acquired after July 29, 1927, and a tax of $34.00 paid by said estate on an automobile constituating such community property, were deductible by the estate, and that no part thereof was deductible by petitioner. Said taxes were paid either out of funds on hand at the time said Roy N. Bishop died, and at such time and at all times prior thereto constituting community property of petitioner and said Roy N. Bishop acquired [52] subsequent to July 29, 1927, or out of funds representing the proceeds of or income from such property. Petitioner contends that since she was the owner of an undivided one-half interest in and to said securities and said autmobile, and in and to the funds out of which the said taxes were paid, she was entitled to deduct one-half of such taxes in computing her net income for the year 1940.

The Tax Court of the United States also erred in deciding that the Estate of Roy N. Bishop, Deceased, was entitled to the full amount of a credit for $4 for income tax withheld at source in 1940 on tax-free covenant bonds which at the time of Roy N. Bishop's death constituted community property of petitioner and Roy N. Bishop acquired after July 29, 1927. Petitioner was the owner of an undivided one-half interest in and to said bonds and the income therefrom, and petitioner contends that she was therefore entitled to one-half of said credit, or $2.

If the foregoing points are decided in petitioner's favor, petitioner is entitled to a refund of $1,-

198.63, on account of a reduction in the taxable amount of a dividend received by petitioner from Pacific Lumber Company, which reduction respondent concedes is correct.

HERMAN PHLEGER
THEODORE R. MEYER
ROBERT H. WALKER
Attorneys for Petitioner [53]

Service and receipt of a copy of the foregoing Statement of Points Relied Upon on Petition for Review is hereby acknowledged by each of the undersigned this 18th day of June, 1945.

J. D. NEWMAN, Jr.,
Commissioner of Internal Revenue

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue
Attorney for Respondent.

[Endorsed]: T.C.U.S. Filed June 18, 1945. [54]

In the United States Circuit Court of Appeals for the Ninth Circuit

[Title of Tax Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN RECORD ON REVIEW

To the Clerk of The Tax Court of the United States:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, copies of the following documents and records in the above-entitled cause, duly certified as correct, in connection with the petition for review by the said United States Circuit Court of Appeals, for the Ninth Circuit, heretofore filed by the above-named petitioner:

1. Docket entries of the proceedings before The Tax Court of the United States.
2. Petition filed on April 20, 1944.
3. Answer to Petition, filed on May 15, 1944.
4. Stipulation of Facts, filed on September 18, 1944.
5. Findings of Fact and Opinion of the Court promulgated on January 16, 1945. [55]
6. Respondent's Computation for Entry of Decision, filed on February 15, 1945.
7. Order of Redeterminaiton of Deficiency entered on March 29, 1945.
8. Petition for Review, filed on June 18, 1945.
9. Notice of filing Petition for Review and the

Admission of Service thereof, filed on June 18, 1945.

10. Statement of Points Relied Upon on Petition for Review and the Admission of Service thereof, filed on June 18, 1945.

11. This designation of Portions of Record, Proceedings and Evidence to be Contained in Record on Review and the Admission of Service thereof.

Said copies of documents and records are to be prepared as required by law and the rules of the United States Circuit Court of Appeals, for the Ninth Circuit.

HERMAN PHLEGER
THEODORE R. MEYER
ROBERT H. WALKER
Attorneys for Petitioner

Service and receipt of a copy of the foregoing Designation of Portions of Record, Proceedings and Evidence to be Contained in the Record on Review is acknowledged by each of the undersigned, this 18th day of June, 1945.

J. D. NEWMAN, Jr.,
Commissioner of Internal Revenue

J. P. WENCHEL
Chief Counsel, Bureau of Internal Revenue
Attorney for Respondent

[Endorsed]: T.C.U.S. Filed June 18, 1945. [56]

[Title of Tax Court and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 56, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 28th day of June, 1945.

[Seal] B. D. GAMBLE,
Clerk, The Tax Court of the United States.

[Endorsed]: No. 11098. United States Circuit Court of Appeals for the Ninth Circuit. Stella Wheeler Bishop, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed July 16, 1945.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11098

STELLA WHEELER BISHOP,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

STATEMENT OF POINTS RELIED UPON ON PETITION FOR REVIEW AND DESIGNATION OF RECORD NECESSARY FOR THE CONSIDERATION THEREOF

Petitioner relies on the following points in petitioning for review of the decision of The Tax Court of the United States in the above entitled proceeding:

The Tax Court of the United States erred in deciding that the entire loss sustained upon the sale of certain corporate stocks by petitioner and Crocker First National Bank of San Francisco, as executors of the will of Roy N. Bishop, Deceased, was deductible by the Estate of Roy N. Bishop, Deceased, in computing the net income of the estate for the year 1940, and that no part of the loss was deductible by petitioner. During the lifetime of Roy N. Bishop petitioner was the owner of an undivided one-half interest in and to said stocks, which constituted California community property acquired after July 29, 1927; her ownership was not

divested by the death of Roy N. Bishop; and petitioner contends that as the owner of an undivided one-half interest in and to said stocks she was entitled to deduct one-half the loss sustained thereon in computing her net income for the year 1940.

The Tax Court of the United States also erred in deciding that petitioner was taxable on the full amount, to-wit, $1,928.09, of the fee received by her in 1940 as executrix of the will of Roy N. Bishop. Said fee was paid either out of funds on hand at the time Roy N. Bishop died, and at such time and at all times prior thereto constituting community property of petitioner and Roy N. Bishop acquired subsequent to July 29, 1927, or out of funds representing the proceeds of or income from such property. Petitioner was therefore the owner of an undivided one-half interest in and to the funds out of which said fee was paid; and petition contends that consequently only one-half of such fee constituted income taxable to her.

The Tax Court of the United States also erred in deciding that transfer taxes of $461.48 paid by the Estate of Roy N. Bishop on the sale of securities which constituted community property of petitioner and Roy N. Bishop at the time of his death, and which were acquired after July 29, 1927, and a tax of $34.00 paid by said estate on an automobile constituting such community property, were deductible by the estate, and that no part thereof was deductible by petitioner. Said taxes were paid either out of funds on hand at the time said Roy N. Bishop died, and at such time and at all times prior

thereto constituting community property of petitioner and said Roy N. Bishop acquired subsequent to July 29, 1927, or out of funds representing the proceeds of or income from such property. Petitioner contends that since she was the owner of an undivided one-half interest in and to said securities and said automobile, and in and to the funds out of which the said taxes were paid, she was entitled to deduct one-half of such taxes in computing her net income for the year 1940.

The Tax Court of the United States also erred in deciding that the Estate of Roy N. Bishop, Deceased, was entitled ot the full amount of a credit for $4.00 for income tax withheld at source in 1940 on tax-free covenant bonds which at the time of Roy N. Bishop's death constituted community property of petitioner and Roy N. Bishop acquired after July 29, 1927. Petitioner was the owner of an undivided one-half interest in and to said bonds and the income therefrom, and petitioner contends that she was therefore entitled to one-half of said credit, or $2.00.

If the foregoing points are decided in petitioner's favor, petitioner is entitled to a refund of $1,198.63, on account of a reduction in the taxable amount of a dividend received by petitioner from Pacific Lumber Company, which reduction respondent concedes is correct.

Petitioner hereby designates the entire record certified to the United States Circuit Court of Appeals for the Ninth Circuit as necessary for the consideration of the foregoing points, and hereby

requests the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit to print the entire transcript of record.

THEODORE R. MEYER
ROBERT H. WALKER
Attorneys for Petitioner

[Endorsed]: Filed July 20, 1945. Paul P. O'Brien, Clerk.

No. 11,098

United States Circuit Court of Appeals

For the Ninth Circuit

STELLA WHEELER BISHOP,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S OPENING BRIEF

THEODORE R. MEYER,
ROBERT H. WALKER,
111 Sutter Street,
San Francisco 4, California,
Attorneys for Petitioner.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 11,098

United States Circuit Court of Appeals

For the Ninth Circuit

STELLA WHEELER BISHOP,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITIONER'S OPENING BRIEF

STATEMENT OF PLEADINGS AND FACTS SHOWING JURISDICTION

This case comes before this Court upon petition for review of a decision of The Tax Court of the United States finding a deficiency of income taxes in the amount of $1,070.23 to be due from petitioner for the year 1940.

The case was tried before The Tax Court on pleadings consisting of a petition (R. 3), an answer thereto (R. 19), and a stipulation of facts (R. 22).

NOTE: All italics are added unless otherwise noted.

The petition to The Tax Court was filed on April 20, 1944 (R. 1), within 90 days after the mailing of the notice of deficiency (R. 4). The Tax Court had jurisdiction under Sections 272 and 1101 of the Internal Revenue Code.

The petition for review was filed on June 18, 1945, within three months after the decision of The Tax Court was rendered (R. 2).

Petitioner's income tax return for the year 1940 was filed with the Collector of Internal Revenue for the First Collection District of California (R. 1, 20), located in the City and County of San Francisco, which is within the jurisdiction of this Court. This Court has jurisdiction under Sections 1141 and 1142 of the Internal Revenue Code.

STATEMENT OF THE CASE

This case presents important issues relating to the income tax status of California community property acquired after July 29, 1927, in which the wife has "a present, equal and existing" interest under California Civil Code Section 161a from the time such property is originally acquired by the husband and wife.

The principal issue involved in the case is whether petitioner, a widow, is entitled to deduct one-half the loss sustained upon a sale of such property made while her husband's estate is being administered; or whether the entire amount of the loss must be deducted by the estate.

The Tax Court held (five judges dissenting) that the entire amount of the loss must be deducted by the estate (R. 30).

The Tax Court's decision was based upon the paradoxical premise that the husband's estate is the owner of the entire community property, since all of it is subject to administration, although the husband was the owner of only one-half the property during his lifetime.

We contend that The Tax Court's decision was in error because during administration of her husband's estate the widow continues to be the owner of one-half of such community property, as she was prior to her husband's death. Consequently, during such period she is entitled to deduct one-half the losses from the sale thereof, as she was during her husband's lifetime. Nothing happens upon her husband's death that would divest her pre-existing ownership of one-half the property; on the contrary, such ownership becomes absolute, because the husband's broad powers of management and control are eliminated by his death, and are replaced by the much more limited powers of his personal representative. If the husband, with the broad powers he had over all the community property, was the owner of only one-half of it, it surely must follow that his personal representative, with much less control, owns no greater share.

Subordinate issues in the case are whether taxes upon community property acquired by petitioner and her husband after July 29, 1927, paid by the husband's estate with funds constituting such property, are deductible in their entirety by the husband's estate, or one-half by the widow; and whether petitioner, who was co-executrix of the husband's estate, is taxable upon the full amount or only one-half of her executrix' fee paid from funds constituting such property. These issues also were resolved

against petitioner by The Tax Court, upon the same grounds as it relied upon in deciding the principal issue.

The Facts.

Petitioner and her husband, Roy N. Bishop, were married in 1907 and were residents of California continuously from the year 1909 to December 20, 1938, when Roy N. Bishop died (R. 28).

Thereafter petitioner and Crocker First National Bank of San Francisco were appointed as executors of the will of Roy N. Bishop (R. 28). In the year 1940, acting as such executors, they sold certain securities that had been acquired by petitioner and Roy N. Bishop between April 20, 1931 and October 29, 1937 (R. 28). These securities constituted California community property of petitioner and Roy N. Bishop continuously from the time they were acquired until the time Roy N. Bishop died (R. 28); and none of them were acquired with funds acquired, or representing the proceeds of property acquired, prior to July 29, 1927 (R.24). The net proceeds of sale of the securities were $33,686.77 less than the cost thereof (R. 23, 26, 28). The expenses of sale were paid from funds constituting California community property of petitioner and Roy N. Bishop acquired after July 29, 1927 (R. 29).

During the year 1940, the estate of Roy N. Bishop paid transfer taxes of $461.48 on the sale of the above-mentioned securities, and paid a tax of $34 on an automobile that constituted community property of petitioner and Roy N. Bishop acquired after July 29, 1927 (R. 29). The funds from which these taxes were paid constituted community property of petitioner and Roy N. Bishop acquired after July 29, 1927 (R. 29).

During the year 1940, the sum of $4 income tax was withheld at source on tax-free covenant bonds which constituted community property of petitioner and Roy N. Bishop acquired after July 29, 1927 (R. 9).

During the year 1940, petitioner was paid $1,928.09 by the Estate of Roy N. Bishop, Deceased, as her executrix' fee. The fee was paid from funds constituting community property of petitioner and Roy N. Bishop acquired after July 29, 1927 (R. 29).

Petitioner deducted one-half of the loss on the sale of the above-mentioned securities and one-half of the above-mentioned taxes in computing her net income for 1940. Likewise, petitioner only included one-half of the executrix' fee in her gross income. Consistently, petitioner included in her gross income one-half of the income received by the estate of Roy N. Bishop from certain bank accounts and securities constituting community property of petitioner and Roy N. Bishop acquired after July 29, 1927 (R. 29, 30). The Commissioner disallowed the deductions, eliminated from petitioner's gross income one-half of the gross income received by the estate of Roy N. Bishop from such community property, and included the entire amount of the executrix' fee in petitioner's gross income (R. 30).

If the issues in this case are determined in petitioner's favor, petitioner is entitled to a refund for the year 1940 arising out of a reduction in taxable amount (conceded by respondent, R. 29) of a dividend received by petitioner in 1940 from Pacific Lumber Company (R. 10, 21, 29); and if this Court reverses the decision of The Tax Court the cause should be remanded to The Tax Court for determination of the amount of the refund.

SPECIFICATION OF ERRORS

(1) The Tax Court of the United States erred in deciding that the entire loss sustained upon the sale of certain stocks by petitioner and Crocker First National Bank of San Francisco, as executors of the will of Roy N. Bishop, deceased, was deductible by the estate of Roy N. Bishop, deceased, in computing the net income of the estate for the year 1940, and that petitioner was not entitled to deduct one-half the loss.

(2) The Tax Court of the United States erred in deciding that petitioner was taxable on the full amount, to-wit, $1,928.09, instead of one-half of the fee received by her in 1940 as executrix of the will of Roy N. Bishop.

(3) The Tax Court of the United States erred in deciding that the entire amount of transfer taxes of $461.48 paid by the estate of Roy N. Bishop, and a tax of $34 paid by said estate on an automobile, were deductible in their entirety by the estate, and that petitioner was not entitled to deduct one-half thereof.

(4) The Tax Court of the United States erred in deciding that the estate of Roy N. Bishop, deceased, was entitled to the full amount of a credit for $4 for income tax withheld at source in 1940 on tax-free covenant bonds, and that petitioner was not entitled to one-half of such credit.

(5) The Tax Court of the United States erred in not determining that petitioner was entitled to a refund of income tax in the amount of $1,198.63 for the year 1940, claimed in petitioner's petition to The Tax Court (R.11).

ARGUMENT

The principal question involved in this case, as previously stated, is whether petitioner, a widow, is entitled to deduct one-half of the losses sustained on sales made during administration of her husband's estate, of stocks constituting California community property acquired after July 29, 1927; or whether the husband's estate must deduct the entire amount of such losses.

The Tax Court held (five judges dissenting) that the estate must deduct the entire amount of such losses, because all of such property is subject to administration, and the estate, therefore, must be the owner of all the property.

We contend that this decision was in error because the husband's estate could not possibly be the owner, under California law, of a greater share of the community property than was the husband. Petitioner was the owner of one-half of the property from the time it was acquired; her ownership was not divested by her husband's death; and she was entitled to deduct one-half the losses, just as she would have been entitled to deduct them had the sales been made prior to her husband's death.

A. THE TAX COURT'S DECISION

The majority opinion of The Tax Court concedes that the precise question involved here has not hitherto been decided by this Court, but states that this Court's decision in *Commissioner v. Larson* (C.C.A. 9th, 1943), 131 F.2d 85, requires an answer contrary to petitioner's contentions. The majority opinion says of the *Larson* case:

> "In that case the Court had under consideration a Washington statute substantially similar to the Cali-

> fornia statute here involved and in its opinion reached the conclusion that because the entire estate was subject to administration in the estate of the deceased husband, the income was 'owned' by the executor or administrator and should be returned in its entirety by him." (R. 30)

The majority also relied, but to a lesser extent, upon *Rosenberg v. Commissioner* (C.C.A. 9th, 1940), 115 F.2d 910. The majority said of the *Rosenberg* case:

> "As we understand *Commissioner v. Larson*, supra, and *Rosenberg v. Commissioner*, 115 F.2d 910, which latter case was also decided by the 9th Circuit, the income from community property during the period of the administration is taxable in its entirety to the executor or administrator and one-half of it may not be returned by the surviving spouse." (R. 31)

These two cases form the entire basis for the decision of the majority.

Neither the *Larson* case nor the *Rosenberg* case is in any way inconsistent with petitioner's position in the instant case.

The *Larson* case held, as The Tax Court majority opinion stated, that all income from Washington community property is taxable to the husband's estate while the estate is being administered. The Court so decided because it found that in Washington title to all the community property passes to the husband's personal representative. The *Larson* case is authority, therefore, for the proposition that taxability follows ownership, which is the point we maintain in this case. But the *Larson* case determined that in *Washington* the husband's estate is the owner of all the

community property; it did not determine that in *California* the estate is the owner of all the community property. In Washington, as in California, the wife is the owner of one-half the community property during the husband's lifetime. *Poe v. Seaborn* (1930), 282 U.S. 101. There is, however, a vital difference between Washington law and California law as respects title to the community personal property *after* the husband's death. Under Washington law, as this Court took pains to point out in the *Larson* case, title to all the community personal property passes to the husband's personal representative. *Devereaux v. Anderson* (1928), 146 Wash. 657, 264 Pac. 422. In contrast, the California statutes expressly provide that upon the husband's death, the wife's half of the community property "belongs" to her. (Sec. 201, Cal. Probate Code.) *This provision is not found in the Washington statutes.* The Washington statutes are therefore vitally different from the California statutes in the respects controlling in this case. As Judge Opper said in his concurring opinion in *Estate of James F. Waters* (1944), 3 T.C. 407:

> "* * * And unlike Commissioner v. Larson this proceeding deals with a California statute which grants to the executor only possession of the community property, as distinguished from Washington, where 'title to the personal property vests in the executor or administrator.'"

It follows that the *Larson* case is not controlling here, nor is it inconsistent with petitioner's position; on the contrary, the principle upon which it was based, that taxability follows ownership, is the identical principle for which we are contending.

The *Rosenberg* case is likewise not in point; it held only that all of the income from community property acquired *prior to* July 29, 1927, as to which the wife had only an expectancy during the husband's lifetime, is taxable to the husband's personal representative after his death, as it was taxable to the husband before then. The decision is authority for the proposition that pre-1927 community property has the same tax status after the husband's death as it has before that time, which is in no way inconsistent with our position that post-1927 community property also has the same status after the husband's death as it had before.

It must also be emphasized that both the *Rosenberg* and *Larson* cases involve the taxability of *income*, while in the present case the primary issue is the deductibility of *losses*. Whatever conclusion might be reached on the ownership of the *income* from the property during administration, the issue in this case is the ownership of the property itself. No one can sustain a loss on property except the person who owns the property. Once it is established that the wife's ownership of one-half the post-1927 community property continues during administration of her husband's estate, the conclusion necessarily follows that any loss on the sale of that one-half interest must be her loss.

The dissenting opinion.

Judge van Fossan, who presided at the hearing before The Tax Court, filed a dissenting opinion, concurred in by Judges Mellott, Arnold, Disney and Opper (R. 32).

Judge van Fossan's dissenting opinion points out that

the *Larson* and *Rosenberg* cases are not controlling for the reasons we have stated above; it concludes that, under California law, it is inescapable that the wife is the owner of one-half the community property after her husband's death, as she was before, and that she is therefore entitled to deduct one-half the losses sustained upon its sale.

The conclusion reached by the dissenting opinion is based upon a careful and accurate statement of California law; and we submit that the reasoning of the dissenting opinion is entirely sound. We will not stop here, however, to analyze the opinion, since its arguments largely parallel those made in this brief.

B. THE TEST OF TAXABILITY IS OWNERSHIP

The majority of The Tax Court seemingly recognized that the question of ownership of property determines who shall deduct losses sustained upon its sale, although the majority was in error, we contend, in determining that the estate was the owner of the entire property.

For two reasons, however, we wish to place particular emphasis upon the point that the test is ownership, and not control over the property. The first reason is that the error of The Tax Court is not conclusively established without proof that ownership, and not control, is the test applied by the income tax laws to determine who shall return income from property and who shall deduct losses sustained upon its sale. The second reason is that ownership is of peculiar significance in this case because the primary question is who shall deduct a loss, not who shall return income.

As Judge van Fossan stated in his dissenting opinion in this case,

> "If anything is basic in income tax law, it is that ownership of property determines the taxability of income earned by or derived from it. *Blair v. Commissioner,* 300 U.S. 5; *Helvering v. Clifford,* 309 U.S. 331." (R. 34)

This doctrine was succinctly stated in *Poe v. Seaborn* (1930), 282 U.S. 101, which held that the wife is taxable upon one-half the income from Washington community property:

> "The case requires us to construe sections 210(a) and 211(a) of the Revenue Act of 1926 (U.S.C. App., Tit. 26, Secs. 951 and 952), and apply them, as construed, to the interests of husband and wife in community property under the law of Washington. These sections lay a tax upon *the net income of every individual.*[1] The Act goes no farther, and furnishes no other standard or definition of what constitutes an individual's income. *The use of the word 'of' denotes ownership.* It would be a strained construction which, in the absence of further definition by Congress, should impute a broader significance to the phrase."

---

[1] "The language has been the same in each Act since that of February 24, 1919 (40 Stat. 1057)."

The decision in *Poe v. Seaborn* is of particular significance here, because the question before the Court was whether the husband's powers of control over all the Washington community property (virtually identical with the husband's powers over all the California community property) made all the income from Washington commu-

nity property taxable to the husband; or whether the wife's ownership of one-half the community property made one-half the income taxable to her.

The provisions of the Internal Revenue Code in effect in 1940, the year involved here, were identical with the parallel provisions of the Revenue Act of 1926, which was construed in *Poe v. Seaborn*. Section 11 of the Internal Revenue Code provides in part that "There shall be levied, collected, and paid for each taxable year upon the net income *of every individual* a normal tax . . ." etc. Section 12(b), providing for a surtax, contains similar language. Section 23(e) provides in part that "In computing net income there shall be allowed as deductions: (e) * * * In the case of an individual, losses *sustained* during the taxable year * * *". Section 161 provides that "The taxes imposed by this chapter upon individuals shall apply to the income *of estates* or of any kind of property held in trust * * *". Section 162 provides that "The net income *of the estate* shall be computed in the same manner and on the same basis as in the case of an individual * * *".

Thus the Internal Revenue Code applies the same test, to-wit, ownership, as did the Revenue Act of 1926, construed in *Poe v. Seaborn*.

So far as losses are concerned, it is axiomatic that a loss is sustained, and hence deductible, only by the owner of the property involved. *Anderson v. Wilson* (1933), 289 U.S. 20.

The test of ownership applies in full force to California community property. It was held in *Malcolm v. United States* (1931), 282 U.S. 792, that one-half the income from California community property acquired after July 29,

1927, is taxable to the wife during the husband's lifetime. Thus, taxability in this instance, as in others, depends upon ownership; and the extensive powers of management and control by the husband over all the community property, which apply equally to pre-1927 and post-1927 community property, are not sufficient to make the husband the owner of the wife's half of the post-1927 community property during his lifetime.

Moreover, the test of ownership is of particular significance because the principal issue involved here is whether petitioner is entitled to deduct one-half of a loss incurred from the sale during administration of community property acquired after July 29, 1927. The question of control over property upon which a loss has been sustained is not important in determining who sustained the *loss*, regardless of whether it might be important in determining who shall return the *income* from property. Only the owner of the property sustains the loss; and only the owner is permitted to deduct it.

Finally, our contention that ownership is the test is sustained by *Commissioner v. Larson,* supra, in which the Court stated:

> "Petitioner contends that 'ownership' is again the test to be used in solving the question, while respondent contends that the test is 'receipt and control during administration * * * not ultimate beneficial interest' * * * *We think the test of ownership is applicable here* (131 F.2d at 86, 87)."

C. DURING THE PERIOD OF ADMINISTRATION OF HER HUSBAND'S ESTATE THE WIFE IS THE OWNER OF ONE-HALF THE COMMUNITY PROPERTY ACQUIRED AFTER JULY 29, 1927

On July 29, 1927, California Civil Code Section 161a became effective. It provides as follows:

> "§161a. The respective interests of the husband and wife in community property during continuance of the marriage relation are *present, existing* and *equal* interests under the management and control of the husband as is provided in sections 172 and 172a of the Civil Code. This section shall be construed as defining the respective interests and rights of husband and wife in the community property."

Notwithstanding the husband's powers of management and control conferred by Sections 172 and 172a of the Civil Code, and expressly reserved to him by Section 161a, the latter section confers ownership of one-half the community property upon the wife at the time of its acquisition. Consequently, one-half the income from such property is taxable to her during the husband's lifetime. *Malcolm v. U. S.* (1931), 282 U.S. 792; *Poe v. Seaborn* (1930), 282 U.S. 101.

Furthermore, the wife is so far the owner of her one-half that it cannot be included in her husband's gross estate for the purposes of the estate tax prior to the effective date of the Revenue Act of 1942. *U. S. v. Goodyear* (C.C.A. 9, 1938), 99 Fed.(2d) 523; *Sampson v. Welch* (1938), 23 Fed. Supp. 271, 40 Fed. Supp. 1014, affirmed (C.C.A. 9, 1943), 138 Fed.(2d) 417.

Upon the husband's death the wife's one-half of such

property *belongs* to her under Section 201 of the *Probate Code*, which provides as follows:

> "§201. *Succession.* Upon the death of either husband or wife, one-half of the community property *belongs* to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof *goes to* the surviving spouse, subject to the provisions of sections 202 and 203 of this code."

There is nothing in these code sections, nor in any other law of California, to justify the conclusion that the wife ceases, upon her husband's death, to be the owner of a property interest which she had during his lifetime. The only effect of the husband's death on the wife's one-half of such community property is to make her ownership of it absolute. The husband's powers of management and control are swept away; and the only restrictions left upon the wife's ownership are those attributable to the limited powers of her husband's personal representative, to-wit, the power to take possession of the property and to apply it to the extent necessary to pay debts, under Section 202 of the Probate Code, which provides in part as follows:

> "§202. Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration and disposal under the provisions of Division III of this code; * * *"

These powers were possessed by the husband during his lifetime, and they were not sufficient even when com-

bined with his broad powers of management and control to make him the owner of her half. During his lifetime he could sell, invest and reinvest the entire community property and dispose of it in any other way he saw fit, except that he could not make a gift of it without the wife's consent (*Cal. Civil Code,* Sec. 172). These rights disappear upon his death. If the husband, with such broad powers, was not the owner of the wife's half during his lifetime, how then can his estate become the owner of it when the powers of his personal representatives are so much more limited? In *Poe v. Seaborn,* supra, the United States Supreme Court pointed out in respect to Washington community property that "The law's investiture of the husband with broad powers, by no means negatives the wife's present interest as a co-owner". It is inconceivable, then, that the narrow powers of the husband's personal representative could "negative the wife's present interest as a co-owner".

This analysis of the effect of the husband's death on the wife's interest was confirmed by *Sampson v. Welch,* supra, holding that the wife's half of the community property acquired after 1927 is not part of the husband's gross estate for estate tax purposes. In the *Sampson* case the court stated:

> "The wife's interest under section 161a exists during her husband's lifetime. His death merely lifts the restrictive limitations to which it was subject under sections 172 and 172a, except in so far as section 202 subjects it to his debts. On his death, the property interest belongs to the wife, not to the husband's estate. Consequently, it cannot be included in his gross estate in computing estate taxes." (23 Fed. Supp. at 281)

It is perhaps important to note that the Commissioner's position, like that of The Tax Court, is based entirely upon the *Rosenberg* and *Larson* cases. Prior to the time these cases were decided the Commissioner ruled in G. C. M. 20472, 1938-2 C. B. 158, that ownership of one-half the post-1927 community property is vested in the widow during the period of administration, and that accordingly one-half of any gain or loss realized on the sale thereof during such period should be treated as gain or loss of the widow. Petitioner's arguments are well expressed by the Commissioner himself in G.C.M. 20472, which stated as follows:

> "Although the community property of the widow is subject to community debts and is under the control of the probate court pending satisfaction of such debts, this does not appear to constitute an important variation in the status existing prior to the death of the husband. At all times prior to the death of the husband the community property was subject to the debts of the community and was subject to control and disposition by the husband. Yet, during that time one-half the income from the community property was regarded as taxable to the wife. Upon the death of the husband, title to one-half of the property remains in the widow, the property remains subject to community debts as it was prior to the death of the husband, and the control over the property by the probate court appears to be no greater than that previously exercised by the husband. Accordingly, there appears no compelling reason for a change of the status of the community property for purposes of Federal income tax."

In G.C.M. 23811, I.R.B. 1943-16-11517, the Commissioner reversed his original position as stated in G.C.M. 20472;

and a study of the later ruling indicates clearly that the reversal was based entirely upon his interpretation of the *Rosenberg* and *Larson* cases.

As we have pointed out, the *Rosenberg* and *Larson* cases involved issues entirely distinct from the issue involved here, and we submit that the irresistible logic of the situation compels the conclusion that the widow remains the owner of one-half the California community property after the husband's death, as she was before, and that consequently she is entitled to deduct one-half the losses on the sale of such property after the husband's death, as she was before.

Subordinate issues.

Petitioner's position on the subordinate issues rests upon the same grounds as does her position on the principal issue. Since the taxes involved were paid on property of which she was the owner of one-half, and were paid with funds of which she was the owner of one-half, it follows that she is entitled to deduct one-half the payments. Since she was already the owner of one-half of the funds with which the executrix' fee was paid, only the other one-half constituted income to her.

CONCLUSION

The principal question to be decided in this case is whether the widow is entitled to deduct one-half the loss on the sale of post-1927 community property during administration of her husband's estate.

We contend that she is entitled to deduct one-half the loss because she was the owner of one-half the property, and because a loss on the sale of property is sustained by the owner of that property and by no one else.

We say that there is no legal basis for the theory that the ownership of one-half the community property, vested in the wife both before and after the period of administration, departs from her at the beginning of that period and reverts to her at the end of it.

We say also that the executor's control of the community property is no greater, but actually less, than the husband's control; that the liability of the property to debts during administration is merely a continuance of its liability to debts during the husband's lifetime; and that since these characteristics of the property do not prevent recognition of the wife's one-half interest for tax purposes during the husband's lifetime, neither should they do so after his death.

The *Rosenberg* case does not support The Tax Court's decision because it involved pre-1927 California community property, as to which the wife admittedly had no ownership prior to her husband's death; the present case involves post-1927 California community property, as to which the wife is the owner of a one-half interest from the time of its acquisition.

The *Larson* case does not support The Tax Court's decision because it involved Washington community personal property, title to which during administration is vested in the executor. The California law does not vest the executor with title to the wife's interest in post-1927 community property during administration.

Moreover, the *Rosenberg* and *Larson* cases both involved *income* from community property, whereas here we are concerned with *losses*. Whatever might be said as to ownership of the income received by the executor during administration, the property itself unquestionably continues to be owned one-half by the wife; there is nothing in the law to justify the assumption that what is vested in her before and after the period of administration is not hers during that period.

Since the wife continues to be the owner of one-half the property during administration, no one but she can be entitled to deduct a loss sustained on the sale of such one-half during that period. To allow the loss to the estate is to permit it to reduce its tax liability by a loss it has not suffered.

San Francisco, California,
September 14, 1945.

THEODORE R. MEYER,
ROBERT H. WALKER,
111 Sutter Street,
San Francisco 4, California,
Attorneys for Petitioner.

No. 11098

In the United States Circuit Court of Appeals for the Ninth Circuit

STELLA WHEELER BISHOP, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWALL KEY,
HELEN R. CARLOSS,
HILBERT P. ZARKY,
Special Assistants to the Attorney General.

INDEX

CITATIONS

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11098

STELLA WHEELER BISHOP, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Tax Court and the dissenting opinion (R. 27–39) are reported at 4 T. C. 588.

JURISDICTION

The petition for review (R. 43–47) involves federal income taxes for the calendar year 1940 in the amount of $1,070.23. The notice of deficiency was mailed to the taxpayer on February 29, 1944. (R. 12–16.) The taxpayer filed a petition for redetermination with the Tax Court on April 20, 1944, under the provisions of Section 272 of the Internal Revenue Code. (R. 1, 3–11.) The decision of the Tax Court sustaining the deficiency determination was entered on March 29, 1945. (R. 4.) The case is brought to this Court by a

petition for review filed by the taxpayer on June 18, 1945 (R. 43–47), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

QUESTIONS PRESENTED

1. Whether, upon administration of a decedent's estate in California, losses sustained on the disposition of community property are, as held by the Tax Court, deductible in full by the estate or whether one-half may be deducted by the surviving wife (the taxpayer).

2. Whether expenses incurred in connection with the sale of community property and taxes paid with respect to such property are, as held by the Tax Court, deductible in full by the estate or whether one-half may be deducted by the surviving wife (the taxpayer).

3. Whether taxpayer, as held by the Tax Court, must report as her taxable income the full amount of the compensation received by her as executrix of her husband's estate.

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes and regulations involved are set forth in the Appendix, *infra*, pp. 22–25.

STATEMENT

The taxpayer and her husband, Roy N. Bishop, were married in 1907 and remained married until December, 1938, when Roy N. Bishop died. During their marriage, the taxpayer and her husband were domiciled in California. (R. 28.)

After the death of Roy N. Bishop, his will was admitted to probate by the Superior Court for the City and County of San Francisco. The taxpayer and the Crocker First National Bank of San Francisco were appointed as executrix and executor. (R. 28.)

Certain securities, which had been acquired by the taxpayer and her husband during the period 1931-1937 at an aggregate cost of $65,672.52 were sold by the taxpayer and the bank, acting as executrix and executor, at an aggregate loss of $33,686.77. The securities constituted community property of the taxpayer and her husband. (R. 28–29.)

In disposing of the securities the estate paid transfer taxes of $641.48. The estate also paid a tax of $34 on an automobile which constituted community property. (R. 29.)

In 1940, the estate received dividends of $4,299.11 from certain securities and received interest of $132.15 on bonds and bank deposits belonging to the estate. A portion of some of the dividends received were non-taxable. (R. 29.)

During the year 1940 the taxpayer received a fee of $1,928.09 for her services as executrix of the estate. (R. 29.)

The taxpayer, in her income tax return for 1940, claimed a deduction for one-half of the recognizable loss from the sale of the securities and a deduction for one-half of the taxes paid. She reported in her income one-half of the dividends and interest received by the estate and reported only one-half of the fee which she received as executrix. (R. 30.)

In *Rosenberg* v. *Commissioner,* 115 F. 2d 910, this Court decided that, since all the property of the community in California is subject to administration in the estate of the deceased husband, it forms such an integral part of his estate that the entire income therefrom is taxable to the estate as a separate entity. The decedent there died in 1929, and the decedent here in 1938; however, there was no change in the pertinent provisions of the Probate Code during the interim. While the *Rosenberg* case, unlike the present case, involved property acquired by California spouses prior to 1927, we shall show that the 1927 changes in the California law relating to community property did not alter the fundamental concept that, upon dissolution of the community by the death of the husband, all community assets are subject to administration in his estate. We shall also show that the law of California is the same, in all essential respects, as that of Washington where, as determined by this Court in *Commissioner* v. *Larson,* 131 F. 2d 85, income and gains from community property during the administration of the husband's estate are taxable in their entirety to the estate. In this respect, the law of California is also similar to that of Texas; in *Barbour* v. *Commissioner,* 89 F. 2d 474 (C. C. A. 5th), it was likewise held that the gains from community property are taxable to the decedent's estate. The *Rosenberg, Larson* and *Barbour* cases clearly require that the decision of the Tax Court be affirmed.

With respect to community property of California spouses acquired prior to 1927, the wife's interest was a mere expectancy during the continuance of the com-

munity.[1] The adoption in 1927 of Section 161a of the Civil Code of California operated to give her, with respect to subsequently acquired community property, a present, existing and equal interest.[2] Whatever changes may have been effected in the wife's interest during the continuance of the community,[3] it is quite clear that the adoption of Section 161a and its definition of the "interests of the husband and wife in community property during continuance of the marriage relation" did not alter her relationship to the community assets while her husband's estate is in the process of administration. While, except as to income derived from community property acquired prior to the 1927 amendment, the wife may now report one-half of the community income in a separate return during the husband's lifetime,[4] upon dissolution of the community, the executors or administrators of the husband's estate possess, as they always have, the right to administer all community assets (together with his separate property) and are entitled to the income and gains from the community assets as part of his estate.

---

[1] *United States* v. *Robbins*, 269 U. S. 315; *Spreckels* v. *Spreckels*, 172 Cal. 775, 158 Pac. 537; *Stewart* v. *Stewart*, 199 Cal. 318, 249 Pac. 197.

[2] *Commissioner* v. *Cavanagh*, 125 F. 2d 366 (C. C. A. 9th); *Bank of America etc. Assn.* v. *Mantz*, 4 Cal. 2d 322, 327, 49 P. 2d 279, 281.

[3] See *Grolemund* v. *Cafferata*, 17 Cal. 2d 679, 111 P. 2d 641, certiorari denied, 314 U. S. 612, holding that even during the continuance of the community, the husband's management and control of the property and its liability for his separate debts remained unchanged by Section 161a.

[4] *United States* v. *Malcolm*, 282 U. S. 792; *O'Bryan* v. *Commissioner*, 148 F. 2d 456, 458 (C. C. A. 9th).

The California law provides that upon the death of the husband, the community property "is subject to his debts and to administration and disposal under the provisions of Division III of this Code * * *."[5] The executor or administrator must file an inventory showing the estate of the decedent that has come into his possession and must specifically demonstrate "what portion of the property is community property and what portion is separate property of the decedent."[6] Under Division III of the Probate Code, "The executor or administrator must take into his possession all the estate of the decedent, real and personal * * *."[7] It is expressly provided that:

> The executor or administrator is entitled to the possession of all the real and personal property of the decedent, and to receive the rents, issues and profits thereof until the estate is settled or until delivered over by order of the court to the heirs, devisees or legatees.[8]

These statutory provisions antedated the adoption in 1927 of Section 161a of the Civil Code of California.[9] That no legislative change was intended with respect to the administration of community property or the wife's interest therein during the course of administration is especially evident from the fact that the complete statutory scheme which was

---

[5] Section 202, California Probate Code, Appendix, *infra*.

[6] Sections 600 and 601, Probate Code, Appendix, *infra*.

[7] Section 571, Probate Code, Appendix, *infra*.

[8] Section 581, Probate Code, Appendix, *infra*.

[9] Sections 1401 and 1402, Civil Code of California (Deering, 1923); Sections 1445, 1452, 1581, California Code of Civil Procedure (Deering, 1923).

in effect prior to 1927 was enacted in 1931, without material change, by the adoption of the Probate Code.[10]

In the *Rosenberg* case, *supra,* this Court made the following observations respecting the administration in California of community property after the husband's death (p. 912):

> Whatever difference may have existed between the rights of heirs in the property of an intestate and the rights of the widow in community property acquired by her husband and herself prior to the year 1927, it is clear that upon the death of the husband their property is subject to administration in the Superior Court sitting in probate. That court not only determines what debts and what expenses of administration are to be paid therefrom but also determines what part of the property of the decedent is community property, when it was acquired, the attributes thereof, and the respective rights of the widow and heirs, devisees or legatees therein. Until the administration of the estate it cannot be determined authoritatively by any other courts what property is and what property is not community property, or how the distribution shall be made. Cal. Probate Code, Deering, 1937, §§ 202, 300.

The same conclusions are true respecting the administration of property acquired in community after 1927, the statutory provisions having remained unchanged in this respect. The validity of the view which this

[10] California Statutes (1931), c. 281. The provisions referred to in fn. 9, *supra*, were adopted, without material variation, in Sections 201, 202, 571, 581, 600, and 601 of the Probate Code.

Court took with respect to the law of California is emphasized by recent pronouncements of the California courts:

> The court in probate has always exercised jurisdiction over the interest of the surviving wife in the community property in the course of administration upon the estate of a deceased husband. No one of the powers of the court in probate is more firmly settled or more universally conceded and acted upon than this one.[11]
>
> The probate court unquestionably had jurisdiction to determine what interest appellant had, as surviving wife, in the estate which was being administered and could determine what property, if any, was community property.[12]
>
> It is clear, therefore, that the portion of the community property which belongs to the wife is the one-half which remains after the payment of the husband's debts and the expenses of administration apportioned between the community and separate property in accordance with the value thereof, and this is true even when the husband's share of the community, together with his separate property, is ample to pay those debts and expenses.[13]

The possession by the executor of both the separate and community property of a deceased spouse is exclusive and is immune from collateral inquiry by the surviving spouse, who can only come into possession

---

[11] *Colden* v. *Costello*, 50 Cal. App. 2d 363, 369, 122 P. 2d 959, 963.

[12] *Estate of Stephenson*, 65 Cal. App. 2d 120, 122–123, 150 P. 2d 222, 223.

[13] *Estate of Coffee*, 19 Cal. 2d 248, 252–253, 120 P. 2d 661, 664.

upon a proper decree of distribution by the Superior Court sitting in probate.[14] It is the probate court which has jurisdiction to determine what property of the deceased spouse was community property,[15] since all community assets are administered as part of the decedent's estate.[16] This has always been the rule in California.[17] It is of prime importance to observe that the California courts do not draw any distinction between property acquired before and property acquired after 1927.[18]

It is also significant to observe that the wife's interest in the community assets during administration is not considered as one adverse to the estate.[19] Thus, in California, the probate court does not possess any jurisdiction to try title to property which is claimed adversely to the decedent's estate; it has been held that the wife's claim to her own separate property constitutes such an adverse claim.[20] Also, the wife's interest in property which she and her husband held in joint tenancy gives her an ownership on his death

---

[14] *Parsley* v. *Superior Court*, 40 Cal. App. 2d 446, 104 P. 2d 1073.

[15] *Estate of Stephenson*, *supra*, fn. 12.

[16] *Colden* v. *Costello*, *supra*, fn. 11.

[17] *In re Burdick*, 112 Cal. 387, 44 Pac. 734; *Rosenberg* v. *Commissioner*, 115 F. 2d 910 (C. C. A. 9th).

[18] In *Estate of Stephenson*, *supra* (fns. 12, 15), the property was actually acquired after 1927, yet the court did not deem that of such significance to require specific mention. In *Parsley* v. *Superior Court*, *supra* (fn. 14), and in *Colden* v. *Costello*, *supra* (fns. 11, 16), the dates of the acquisition of the property were considered so immaterial that the opinions do not disclose whether acquisition was before or after 1927.

[19] *Colden* v. *Costello*, *supra; In re Burdick*, *supra*, fn. 17.

[20] *Estate of Niccolls*, 164 Cal. 368, 129 Pac. 278; *Barnard* v. *Wilson*, 74 Cal. 512, 5 Pac. 237.

which cannot be administered as part of his estate; her title, which is adverse to the estate and not subject to the jurisdiction of the probate court, can be determined in a collateral proceeding.[21] By contrast, however, stands the wife's interest in the community assets during administration. Since her claim to a share of the community property is not considered adverse to the estate, only the probate court has jurisdiction to decree what is her share of the community assets,[22] and that decree is not subject to collateral attack.[23] Here, too, the California courts have not considered the date of acquisition of the property to be a material factor.

> The Probate Code provides one comprehensive, exclusive method for administration upon the estates of decedents. The proceeding is *in rem* and the jurisdiction of the court is complete over the property of the estate and over all persons claiming interests therein under the decedent, as to all matters involved in a complete and effective administration. The law does not provide an alternative procedure for determining question of heirship in connection with rights of succession or the probate of wills, nor one in which the court has jurisdiction over all heirs and other claimants, both known and unknown. In those respects probate law is unique and exclusive. *The title of a surviving wife to her interest in the community estate rests upon a decree of distribution. Her right as survivor*

---

[21] *Tooley* v. *Commissioner*, 121 F. 2d 350, 354–358 (C. C. A. 9th).

[22] *Colden* v. *Costello*, *supra*.

[23] *Estate of Tretheway*, 32 Cal. App. 2d 287, 291, 89 P. 2d 679, 681.

> *of the community is one thing; the decree of distribution which determines and identifies the estate which comes to her by virtue of her right is quite another, and is indispensable as a muniment of her title.*[24] [Italics supplied.]

As a result, it can only be concluded that an executor or administrator in California possesses the identical authority with respect to community assets that were acquired after 1927 as he does with respect to property acquired before that date. Whether acquired before or after 1927, those assets are administered as part of the decedent's estate, they are in the possession of the executor or administrator, and he alone is entitled to the "profits thereof until the estate is settled." [25]

We submit that *Rosenberg* v. *Commissioner, supra,* is indistinguishable and governs the disposition of the present case. The rights of the executors of the deceased in this case with respect to the community assets are exactly the same as those possessed in the *Rosenberg case.* The taxpayer's attempt to avoid the effect of that decision and to distinguish it (Br. 10) on the ground that the property there was acquired prior to 1927 is, accordingly, without merit.

The taxpayer's additional attempt to avoid *Commissioner* v. *Larson, supra,* is equally ineffectual. The *Larson* case is distinguishable, so the taxpayer claims, because in California, unlike Washington, the wife's half of the community property "belongs" to her by statute. (Br. 9.)

---

[24] *Colden* v. *Costello*, 50 Cal. App. 2d 363, 370, 122 P. 2d 595, 963.

[25] Section 581, California Probate Code.

The argument that the wife's half of the community property "belongs" to her is based on Section 201 of the Probate Code (Appendix, *infra*). (Br. 9.) That provision, however, was adopted in 1923,[26] not 1927, and did not change the nature of the wife's interest during the existence of the community.[27] As a statute of succession, it was fully applicable to the property of the deceased in the *Rosenberg* case.[28] The fact, however, that half of the property "belonged" to the wife in the *Rosenberg* case did not make the wife liable for the tax on any part of the income from the community property during administration; instead, the estate was held taxable on the full amount. Moreover, it is clear that the *Larson* case cannot be distinguished on this ground for no difference exists between Washington and California law in this respect. Thus, the Washington court, in *In re Coffey's Estate,* 195 Wash. 379, 81 P. 2d 283, 284, stated:

> The interest of the wife in the community estate in this state is not a contingent or expectant interest, but a present, undivided, one-half interest. (Citations omitted.) No new right or interest is generated in the wife by the death of her husband; his death merely affords the occasion for the termination of the husband's interest in the community estate.

The taxpayer also attempts to distinguish the *Larson* case on the ground that in Washington, unlike California, legal title to personal property vests in

---

[26] California Statutes (1923), c. 18.

[27] *Hirsch* v. *United States*, 62 F. 2d 128 (C. C. A. 9th).

[28] *Estate of Phillips*, 203 Cal. 106, 263 Pac. 1017.

the administrator. (Br. 8–9.) We do not believe that the *Larson* case was decided on this basis. We believe, rather, that the case was determined on the ground that in Washington, as in California, "the entire community estate, not merely the half interest of the decedent, is subject to administration." [29] It may be noted that part of the income involved in the *Larson* case was rent and that this Court did not attach any significance to the fact that in Washington title to real estate does not vest in the executor or administrator. *In re Peterson's Estate,* 12 Wash. 2nd, 686, 734, 123 P. 2d 733, 754–755.

So far as title to property is concerned, it is clear that in California the executor or administrator never acquires title either to personalty or realty, and that is so regardless of whether it is separate or community property. In California, title passes immediately to the persons entitled to the property, "with a qualified right in the personal representative, who holds it, for the purposes of administration, more like a receiver than like a common-law executor." [30] Even though title passes to the persons ultimately entitled to the property, it does not carry with it the right to immediate possession and enjoyment; that right, instead, is in the executor or administrator while the assets of the estate are being administered.[31]

---

[29] 131 F. 2d 85, 87.

[30] *Murphy* v. *Crouse,* 135 Cal. 14, 17, 66 Pac. 971, 972.

[31] *Robertson* v. *Burrell,* 110 Cal. 568, 42 Pac. 1086; *Estate of Piercy,* 168 Cal. 750, 145 Pac. 88; *Burr* v. *Floyd,* 137 Cal. App. 692, 31 P. 2d 402; *Security-First Nat. Bk.* v. *Perrine,* 29 Cal. App. 2d 223, 84 P. 2d 248.

Thus, there is no real difference between Washington and California in this respect. In both states, regardless of where naked legal title reposes, it is the personal representative who is entitled to the possession of and to the income from all of the decedent's estate, including the entire community property during administration.[32]

The *Larson* case clearly cannot be distinguished on the ground that title to part of the assets there was in the administrator, unless it be held that the *Rosenberg* case, where there was no title in the administrator, was decided erroneously, and unless it be held that the rental from the real property, as to which the executor had no title, was erroneously taxed to the estate in the *Larson* case. Also, the cases cannot be distinguished on that ground unless it be held that in California the estate can never be the tax entity, even where separately owned property is being administered, since legal title to such property would never be in the administrator.

It should be apparent, however, that naked legal title is no more the criterion of taxability here than it is in connection with other tax problems.[33] Thus, the administration of community property in Texas, which was considered in *Barbour* v. *Commissioner,* 89

---

[32] *Bishop* v. *Locke*, 92 Wash. 90, 158 Pac. 997; *In re Peterson's Estate*, 12 Wash. 2d 686, 123 P. 2d 733; Sec. 1464, Washington Revised Statutes (Remington, 1932). See Section 581, California Probate Code, footnote 8, *supra*, and the California cases cited in footnote 31, *supra*.

[33] Cf. *Helvering* v. *Clifford*, 309 U. S. 331; *Helvering* v. *Hallock*, 309 U. S. 106; *Palmer* v. *Bender*, 287 U. S. 551.

F. 2d 474 (C. C. A. 5th), appears to be substantially the same as that in California; it was there held that gains from the sale of all community property were taxable to the decedent's estate. If the taxpayer should attempt, as was done before the Tax Court, to distinguish the *Barbour* case on the ground that the executor in Texas acts as a trustee of the assets of the estate, the answer is that the same considerations are true in California.[34] Thus, it has been said:

> The administrator, also, is a trustee with well-defined duties, among the first of which is that of collecting the assets of the estate, and paying its just debts after due notice to creditors. The heirs' title is subject to the performance by the administrator of all his trusts, and they finally come into the possession and enjoyment of only such portion of the estate as may remain after the execution of them by the administrator.[35]

This statement of California law may be compared with the law of Texas and the reasons why income is taxable to the decedent's estate, as expressed in *Kuldell* v. *Commissioner,* 69 F. 2d 739, 741 (C. C. A. 5th):

> It is perfectly true that under Texas laws an administrator takes no title to the property, either real or personal; that all of it descends to and vests in the legatees under a will, in the heirs, if there is none. It is equally true, however, that it does so subject to the payment of the debts of the intestate, and that it is

---

[34] The dissenting opinion of the Tax Court also attempted to distinguish the *Barbour* case on that ground. (R. 38.)

[35] *Robertson* v. *Burrell,* 110 Cal. 568, 574, 42 Pac. 1086, 1087. Accord: *Burr* v. *Floyd, supra,* fn. 31.

> provided that upon the issuance of letters testamentary or administration, the executor or administrator shall have the right to the possession of the estate as it existed at the death of the testator or intestate, and he shall recover possession and hold such estate in trust to be disposed of in accordance with law. It was in recognition of this period of husbandry and control by the administrator, which prudent administration requires, that the Revenue Acts provide that income received by estates during the period of administration or settlement shall be returned and paid by the administrator.

The Board of Tax Appeals has taken a similar view of the matter, holding that, although title to a decedent's property in Oklahoma passes immediately to his heirs, the income during administration is taxable to the estate because the property is subject to administration, and because the right to possession of the assets and the income therefrom is vested in the administrator pending completion of administration.[36]

If important differences do exist between the laws of Washington and California, we submit that the wife has an interest in the community assets which are administered in California which is less than that under Washington law. For, in California, the community estate is liable, together with the husband's separate estate, for a proportionate share of his separate debts and the expenses of administering his estate. This is true even where his separate property

---

[36] *Estate of McBirney* v. *Commissioner*, decided June 23, 1942, rehearing denied, September 16, 1942 (1942 P-H B. T. A. Memorandum Decisions, pars. 42,360, 42,509).

is sufficient to pay all his separate debts and administrative expenses.[37] In Washington, however, on the husband's death, the wife's one-half of the community estate is not liable for her husband's separate debts—only his half is so liable.[38] Thus, it is especially true in California that the wife's interest in the community cannot be ascertained until her husband's estate has been completely administered.

We agree with the taxpayer's fundamental premise that "ownership" is the ultimate consideration in determining taxability (Br. 11 *et seq.*); it is submitted, however, that the taxpayer mistakenly identifies "ownership" with legal title. All the important indicia of ownership, i. e., possession, control and the right to income exist in the executors or administrators during administration. Regardless of where legal title exists, ownership lies in the estate during administration.

It can only be concluded that all income from community property in California during administration is taxable to the administrator of the husband's estate and that no part thereof is attributable to the wife until administration has been completed.

It seems fairly obvious that there is no merit in the taxpayer's apparent contention that, even if all the income from the property is taxable to the estate, it should be entitled to deduct only one-half of the

---

[37] *Estate of Coffee*, *supra*, fn. 13.

[38] *In re McHugh's Estate*, 165 Wash. 123, 127–128, 4 P. 2d 834, 836; *Kelley* v. *Butler*, 182 Wash. 310, 315, 47 P. 2d 664, 666. See 1 deFuniak, Principles of Community Property (1943), Sec. 212.

losses on the disposition of community property. (Br. 1, 14, 21.) We are aware of no authority, and none has been cited by taxpayer, holding that if gain results from the sale of property, it is taxable to one entity, while if losses result they may be taken by a different tax entity. Yet, in *Commissioner* v. *Larson, supra,* and in *Barbour* v. *Commissioner, supra,* it was held that gains from the sale of community assets were taxable to the estate. The very reasons why the gains were taxable to the estates in those cases would apply with equal force to permit the estate to take the deduction where losses are incurred. Once the community has been dissolved by the death of the husband, it is his estate which, during administration, receives the gain from the sale of community property and, for that reason, the estate alone is taxable for that gain. Similarly, since ownership of the assets lies in the estate during administration, it is the estate which suffers the loss on the sale of such property, and it is the estate alone which is entitled to the deduction for the loss.[39]

We have discussed this case only with respect to the issue of whether the entire loss is deductible by the decedent's estate. If, as we believe, the Tax Court was correct in its holding on this issue, there is no need to extend the discussion to show the validity of its decision on the subordinate issues, namely, whether the expenses of the sale of those assets, including transfer taxes, and a tax paid on an automobile which was community property, were entirely deductible by the

[39] *Anderson* v. *Wilson*, 289 U. S. 20.

estate, and whether the amount of income tax withheld at the source on a tax-free covenant bond owned in community was to be credited in full to the estate.

There is, however, one remaining issue which has been raised by the taxpayer but which is not supported by any extended argument. That issue is whether the taxpayer may exclude from her taxable income one-half of the compensation which she received for her services as executrix to her husband's estate. This issue is wholly unrelated to the other questions raised and we can think of no theory which supports it. The taxpayer cites no provision of the statute which would entitle her to exclude or deduct that amount from her taxable income. Regardless of the fact that the expenses of administration were paid out of community assets of the estate, the money came from a separate tax entity and was paid to her as compensation; therefore, it constitutes gross taxable income under Section 22 (a) of the Internal Revenue Code (Appendix, *infra*).

CONCLUSION

In view of the foregoing, the decision of the Tax Court should be affirmed.

Respectfully submitted.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
HELEN R. CARLOSS,
HILBERT P. ZARKY,
Special Assistants to the Attorney General.

OCTOBER 1945.

APPENDIX

Internal Revenue Code:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * * [26 U. S. C. 1940 ed., Sec. 22.]

SEC. 161. IMPOSITION OF TAX.

(a) *Application of Tax.*—The taxes imposed by this chapter upon individuals shall apply to the income of estates or of any kind of property held in trust, including—

* * * * *

(3) Income received by estates of deceased persons during the period of administration or settlement of the estate;

* * * * *

(b) *Computation and Payment.*—The tax shall be computed upon the net income of the estate or trust, and shall be paid by the fiduciary, except as provided in section 166 (relating to revocable trusts) and section 167 (relating to income for benefit of the grantor). [26 U. S. C. 1940 ed., Sec. 161.]

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same

basis as in the case of an individual, * * * [26 U. S. C. 1940 ed., Sec. 162.]

* * * * *

Treasury Regulations 103, promulgated under the Internal Revenue Code:

SEC. 19.161–1. *Income of estates and trusts.*—* * *

* * * * *

The income of an estate of a deceased person, as dealt with in the Internal Revenue Code, is therein described as received by the estate during the period of administration or settlement thereof. The period of administration or settlement of the estate is the period required by the executor or administrator to perform the ordinary duties pertaining to administration, in particular the collection of assets and the payments of debts and legacies. It is the time actually required for this purpose, whether longer or shorter, than the period specified in the local statute for the settlement of estates. If an executor, who is also named as trustee, fails to obtain this discharge as executor, the period of administration continues up to the time when the duties of administration are complete and he actually assumes his duties as trustee, whether pursuant to an order of the court or not. No taxable income is realized from the passage of property to the executor or administrator on the death of the decedent, even though it may have appreciated in value since the decedent acquired it. But see sections 42, 43, and 44. As to the taxable gain realized, or the deductible loss sustained, upon the sale or other disposition of property by an administrator, executor, or trustee, and by a legatee, heir, or other beneficiary, see sections 111 and 112. As to capital gains and losses, see section 117. * * *

* * * * *

Probate Code of California (Deering, 1937):

§ 201. *Succession.*—Upon the death of either husband or wife, one-half of the community property belongs to the surviving spouse; the other half is subject to the testamentary disposition of the decedent, and in the absence thereof goes to the surviving spouse, subject to the provisions of sections 202 and 203 of this code.

* * * * *

§ 202. *Subject to debts, etc.: Death of wife.*—Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration and disposal under the provisions of Division III of this code; but in the event of such testamentary disposition by the wife, the husband, pending administration, shall retain the same power to sell, manage and deal with the community personal property as he had in her lifetime; and his possession and control of the community property shall not be transferred to the personal representative of the wife except to the extent necessary to carry her will into effect.

§ 571. *Duties of executor, etc.: Surviving partner.*—The executor or administrator must take into his possession all the estate of the decedent, real and personal, and collect all debts due to the decedent or to the estate. * * *

§ 581. *Custody of decedent's property: Interests of, actions by and against, heirs and devisees.*—The executor or administrator is entitled to the possession of all the real and personal property of the decedent, and to receive the rents, issues and profits thereof until the estate is settled or until delivered over by order of the court to the heirs, devisees or legatees. * * *

§ 600. *Inventory and appraisement.*—Within three months after his appointment, or within such further time as the court or judge for reasonable cause may allow, the executor or administrator must file with the clerk of the court an inventory and appraisement of the estate of the decedent which has come to his possession or knowledge together with a copy of the same which copy shall be transmitted by said clerk to the county assessor. * * *

§ 601. *Community and separate property.*—The inventory must show, so far as the same can be ascertained by the executor or administrator, what portion of the property is community property, and what portion is separate property of the decedent.

U. S. GOVERNMENT PRINTING OFFICE: 1945

No. 11,098

United States Circuit Court of Appeals

For the Ninth Circuit

STELLA WHEELER BISHOP,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petitioner's Reply Brief

THEODORE R. MEYER,
ROBERT H. WALKER,
111 Sutter Street,
San Francisco 4, California,
Attorneys for Petitioner.

PARKER PRINTING COMPANY, 545 SANSOME STREET, SAN FRANCISCO.

Contents

Table of Authorities Cited

No. 11,098

United States Circuit Court of Appeals

For the Ninth Circuit

STELLA WHEELER BISHOP,
Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Petitioner's Reply Brief

ANALYSIS OF RESPONDENT'S ARGUMENT

The burden of Respondent's argument is stated in the following excerpt from his brief (p. 19):

> "We agree with the taxpayer's fundamental premise that 'ownership' is the ultimate consideration in determining taxability (Br. 11, et seq.); it is submitted, however, that the taxpayer mistakenly identifies ownership with legal title. All the important indicia of ownership, i.e. possession, control and the right to income, exist in the executors or administrators during administration. Regardless of where legal title exists, ownership lies in the estate during administration."

NOTE: Italics used in this brief are ours except where otherwise noted.

Respondent's concession that the ownership of property determines who shall deduct a loss sustained on its sale is coupled with the admission, implicit not only in the above quotation, but also in his entire argument, that the wife retains title to her one-half of the community property acquired after 1927, pending administration of her husband's estate. Respondent thus narrows his case down to a single proposition, that the powers of the husband's personal representative over the wife's one-half of the property are such that substantial ownership of it, as contrasted with title to it, must be held to be vested in the personal representative.

To sustain this proposition, it would seem to be necessary to establish that the powers of the husband's personal representative over the wife's half of the property are greater than the powers that were possessed by the husband, because admittedly the husband was not the owner of the wife's half while he was alive, notwithstanding the broad powers possessed by him (*Malcolm v. U. S.* (1931), 282 U.S. 792; *U. S. v. Goodyear* (C.C.A. 9, 1938), 99 F.(2d) 523).

Section 172 of the California Civil Code provides that "The husband has the management and control of the community personal property, *with like absolute power of disposition, other than testamentary, as he has of his separate estate,* provided, however, that he cannot make a gift of such community personal property * * *"* etc. This section gave the husband almost unlimited power over the wife's half of the community personal property; he could

---

*These powers are expressly reserved to him by Civil Code, Section 161a.

sell it; he could invest and reinvest it; he could encumber it; in short, he could do anything he pleased with it except to give it away without the wife's consent. Nevertheless, he was not the owner of it.

How do the husband's powers compare with those of the husband's personal representative?

The husband's personal representative has the right to possession of the property. *Parsley v. Superior Court* (1940), 40 Cal. App.(2d) 446, 104 P.2d 1073. The husband had the same right.

If the property consisted of cash, the husband's personal representative could use it to pay debts (§202 Cal. Probate Code). Again, the husband had the same right.

Should the husband's personal representative need to sell the property to pay debts, he could do so, but not without the confirmation of the probate court, if the property was real property, or without a previous order of the court, if the property consisted of securities (§§755, 771, Cal. Probate Code).

These are the sole powers possessed by the husband's personal representative. They are insignificant compared with the powers possessed by the husband during his life, and they fall far short of Respondent's characterization of them as "All the important indicia of ownership, i.e., possession, control, and the right to income" (R. Brief, p. 19). Respondent states that Petitioner has confused ownership with legal title. The truth of the matter seems to be that Respondent has confused ownership with possession.

What actually happens on the husband's death is that the majority of the husband's powers (and all those in-

volving discretionary control) are swept away, being replaced by the much more limited powers of his personal representative.

It must be concluded, we submit, that the powers of the husband's personal representative are not greater than the husband's, but on the contrary are far more limited. If the husband's broad powers were not sufficient to make him the owner of the wife's half of the property, then it is inconceivable that his personal representative, with much more limited powers, could be the owner of it. The loss of the husband's powers occasioned by his death can only operate to make the wife's ownership absolute; by no process of reasoning can the elimination of these powers be deemed to occasion a shift of ownership from the wife to the husband's executor or administrator.

So much for the argument that the husband's personal representative has "all the indicia of ownership". Respondent's remaining arguments have no more validity than this one.

Respondent makes much of the powers of the probate court over the wife's half of the community property acquired after 1927 (R. Brief, pp. 9-13). The jurisdiction of the probate court seems to us to have little relevancy in determining whether the wife or the husband's personal representative is the owner of her half of the property. In any event, however, the probate court's powers are in fact very limited. It can confirm sales of real property; and it can authorize sales of securities (Cal. Probate Code, §§755 and 771). If any contest should arise, it can determine what is community property and what is separate. The husband, however, had unlimited authority to sell

community property (Cal. Civ. Code, §172); and should a dispute have arisen during the lifetime of the parties, the courts would have had jurisdiction to determine what was community property and what was separate (*Milekovich v. Quinn* (1919), 40 C.A. 537, 181 Pac. 256). We are unable to see, therefore, how the powers possessed by the probate court add anything to Respondent's argument.

Finally, Respondent relies heavily upon Probate Code, Section 581, which provides that "The executor or administrator is entitled to the possession of all the real and personal property of the decedent and to receive the rents, issues and profits thereof until the estate is settled or until delivered over by order of the court to the heirs, devisees or legatees."

Passing by the question whether this section applies to the wife's half of the community property, which is *her* property under Civil Code §161(a), and not the decedent's, we wish to point out that in this instance, as indeed throughout the Respondent's brief, his argument is that all the *income* from community property acquired after 1927 is taxable to the husband's estate. Respondent has consistently subordinated the real issue in the case, whether one-half of a *loss* sustained upon the sale of such property is deductible by the wife, or whether the entire loss must be deducted by the husband's estate.

This point is of particular importance because it can not be disputed that the owner of property is the only one who sustains a loss on its sale; nor can it logically be denied that after the husband's death the wife continues to be the owner of her half of the community property acquired after 1927. Regardless of whether the husband's

personal representative has enough control over the *income* from the wife's half of the community property acquired after 1927 to constitute him the owner of such income, which is a separate and distinct question from that involved here, it is apparent that he does not have such control over the *property itself*. Respondent contends that it would be anomalous to tax all the income from such property to the estate, but to allow the wife to deduct one-half the loss from the sale of the property. The anomaly, if any, arises out of Respondent's assumption that all the income from community property acquired after 1927 is taxable to the estate. It may be, and we think it should be, taxable one-half to the wife. However, the question has never been decided by the courts and is not involved here.

THE ROSENBERG, LARSON, AND BARBOUR CASES

Respondent contends that the present case is indistinguishable from *Rosenberg v. Commissioner* (C.C.A. 9th, 1940), 115 F.(2d) 910; *Commissioner v. Larson* (C.C.A. 9th, 1943), 131 F.(2d) 85; and *Estate of Barbour v. Commissioner* (C.C.A. 5th, 1937), 89 F.(2d) 474; and that these cases are controlling.

In the *Rosenberg* case, this court made it plain that it was dealing solely with community property acquired prior to 1927; the case does not purport to decide the issue involved in this case, which relates solely to community property acquired after 1927. In the *Rosenberg* case the court held that community property acquired prior to 1927 retains the same tax status after the husband's death as it had before. We contend, similarly, that post-1927 community property retains the same tax

status after the husband's death as it had before. Certainly Respondent has pointed to nothing that could logically be deemed to cause a transfer of ownership of the wife's one-half to her husband's executor or administrator.

Respondent attempts to show that the *Larson* case was not decided on the basis that title to Washington community property passes to the executor; he argues that part of the income involved there consisted of rent, and that title to the community real property does not pass to the executor. Respondent overlooks the following observation made by this court in the *Larson* case: "Pierce's Code, 1933, §9863, provides that title to realty vests immediately in the heirs or devisees who are entitled to the rents, issues and profits thereof as against 'any person *except the executor or administrator* and those lawfully claiming under such executor or administrator'." Thus it is apparent that as between the executor or administrator and the surviving wife, the husband's executor or administrator in Washington has title to realty, as well as to personalty.

In the *Barbour* case the Circuit Court of Appeals for the Fifth Circuit, reversing The Tax Court, held that all income from Texas community property was taxable to a deceased husband's estate pending its administration, and that none of such income was taxable to the widow.

The *Barbour* case is not in point because under the laws of Texas in effect at the time of the husband's death, the husband's executor became statutory trustee of *all* of the community property under Article 3630, Rev. Civ. Stats. of Texas 1925, which provided as follows:

> "Article 3630—Property held by Executor. Until such partition is applied for and made, the executor or administrator of the deceased shall recover possession of all such common property *and hold the same in trust for the benefit of the creditors and others entitled thereto.*"

Thus under Texas law the husband's personal representative, by virtue of his trusteeship, became the owner of the entire community property upon the husband's death. No provision of the California law, however, makes the husband's personal representative a trustee of any part of the community property for any purpose.

This distinction between California law and Texas law was recognized in G.C.M. 20472, 1938-2 C.B. 158 (cited in our opening brief), holding the *Barbour* case not to apply under California law. The ruling stated as follows:

> "* * * a statute of Texas specifically provides, in addition to provisions similar to those set out above, that community property shall be held in trust for the benefit of creditors. Such a statute would appear to vest title to the property during administration in the administrator or executor. A search of the statutes of California fails to reveal any such provision, and inasmuch as upon death of the husband one-half of the community property 'belongs' to the surviving widow, it would be difficult to apply the concept of a trust".

Finally, the *Rosenberg*, *Larson* and *Barbour* cases all involved *income;* in this case we are dealing with a *loss.* As The Tax Court stated in *Estate of James F. Waters* (1944), 3 T.C. 407 (holding that for the purpose of determining the amount of gain or loss on the sale after the

husband's death of the wife's half of community property acquired after 1927, the basis is cost, since the wife remains the owner):

> "Nothing in the *Rosenberg* and *Larson* cases contradicts this holding. In those cases it was held that the ownership of the *income** was in the executor or administrator because of his control over the income. While control of the widow's share of the income may be sufficient to render the estate taxable, certainly it does not evidence such a transfer of ownership as to necessitate assignment of a new basis."
>
> 2 T.C. at 410.

Respondent cites *Robertson v. Burrell* (1895), 110 Cal. 568, 42 Pac. 1086, as holding that in California an executor or administrator is a trustee. A reading of the full opinion in that case, however, discloses that the court meant only that the executor or administrator acts in a fiduciary capacity similar to that of an agent, not that he is a true trustee. It is difficult to see how a trust could exist unless the fiduciary had title, which the executor or administrator admittedly does not.

Respondent argues that the enactment of Civil Code Section 161a only affected the nature of the wife's interest in community property during the husband's lifetime, and did not affect the status of the property after the husbond's death; from this Respondent draws the inference that ownership of the wife's half of community property acquired after 1927 is transferred to the husband's executor or administrator. A sufficient answer to this contention is found in the opinion of Judge Jenney in *Sampson*

---

*Italics the Court's.

v. Welch (1930), 23 F.Supp. 271, 40 F.Supp. 1014, aff'd (C.C.A. 9, 1943), 138 Fed.(2d) 417. In the *Sampson* case the court held that the wife's half of community property acquired after 1927 is not includible in the husband's gross estate for estate tax purposes. The court said:

> "It is significant that under section 201, one-half of the community property does not go to the wife upon her husband's death, but belongs to her. So sharp a difference in wording cannot be ignored. *Construing section 201, adopted in 1923, together with section 161a, adopted in 1927, this court must conclude that the Legislature intended that the wife's interest, bestowed upon her by the latter act, should remain in her—should belong to her—without the limitations upon management and control, now removed by the spouse's death, and without passing into or becoming a part of the decedent's estate for any purpose other than as specified in section 202.*
>
> *"The wife's interest under section 161a exists during her husband's lifetime. His death merely lifts the restrictive limitations to which it was subject under sections 172 and 172a, except in so far as section 202 subjects it to his debts. On his death, the property interest belongs to the wife, not to the husband's estate. Consequently, it cannot be included in his gross estate in computing estate taxes."* (23 F.Supp. 281)

Finally, we wish to point out that there is a fundamental inconsistency between the Commissioner's position in this case, and his position in regard to the tax basis to be used in determining the amount of gain or loss on a sale of community property acquired after 1927, made after the husband's death. Furthermore, the same inconsistency

exists between the decision of The Tax Court in this case and its decision in *Estate of James F. Waters v. Commissioner* (1944), 3 T.C. 407, Acquiesced I.R.B. 1944-15-11814.

Section 113(a)(5) of the Internal Revenue Code prescribes the tax basis (i.e. the amount to be deducted from the selling price) for determining gain or loss on the sale of property acquired by a decedent's estate from the decedent. It provides in part as follows:

> "(5) Property Transmitted at Death.—If the property was acquired * * * by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition."

The Commissioner has ruled in G.C.M. 24292, I.R.B. 1944, No. 15, p. 5, that when community property acquired after 1927 is sold after the husband's death, the basis is not the fair market value of the entire property at the time of the husband's death under §113(a)(5), but that the basis of the wife's half is one-half of the cost of the property to the husband and wife, while the basis of the husband's half is its value at the date of the husband's death. Thus, Respondent concedes in this instance that the wife's half is not acquired by the husband's estate; if it were the basis would be fair market value at the time of the husband's death. Respondent bases this rule on the decision in *Estate of James F. Waters v. Commissioner, supra.* In the *Waters* case both the taxpayer and the Commissioner agreed that the husband's estate was entitled to deduct the entire loss from the sale of community property acquired after 1927, and the only point litigated and decided by the case was the correct basis for computing the

amount of the loss. The Tax Court held that the basis of the wife's one-half is one-half the cost to the community, because the wife remains the owner of her one-half after the husband's death; it is not acquired by the husband's estate. The Tax Court said:

> "It is significant, however, that under section 201 of the probate code one-half of the community property does not go to the wife upon her husband's death, but belongs to her. She does not take as an heir, legatee, or devisee, *In re Brown's Estate*, 129 Pac.(2d) 713; *but by the plain words of the statute ownership of the property itself remains in the widow at all times.*
>
> "With these considerations in mind, we now turn to section 113(a) of the Internal Revenue Code, wherein it is set forth that the basis of property for the purpose of determining gain or loss shall be its cost, except in certain specified instances. It is on authority of the exception numbered (5) that the Commissioner now seeks to sustain the deficiency. This exception reads as follows:
>
> > "'(5) Property Transmitted at Death.—If the property was acquired * * * by the decedent's estate from the decedent, the basis shall be the fair market value of such property at the time of such acquisition * * *'."
>
> "The question thus put is whether the widow's half of the community property 'was acquired by the husband's estate from the decedent'.
>
> "As we have already pointed out, the wife had a present, existing and equal interest in the property with her husband, and upon the death of the husband the wife's share does not pass as a part of his estate, but immediately belongs to her. Thus, it seems clear

that her property could not be 'acquired by the decedent's estate from the decedent'. Therefore, upon disposition of community property by the administrator of the deceased husband's estate, the proper basis for gain or loss of the widow's undivided one-half share is cost (adjusted) to the community.

"Nothing in the *Rosenberg* and *Larson* cases contradicts this holding. In those cases it was held that the ownership of the *income** was in the executor or administrator because of his control over the income. While control of the widow's share of the income may be sufficient to render the estate taxable, certainly it does not evidence such transfer of ownership as to necessitate assignment of a new basis." (3 T.C. at 409)

The decision of The Tax Court in the *Waters* case, based on the premise that the husband's executor or administrator is not the owner of the wife's half of the community property after the husband's death, cannot be reconciled with its decision in the instant case. Nor can Respondent's acquiescence in the rule of the *Waters* case be reconciled with his position in the instant case. If the wife is considered to remain the owner of her half after the husband's death for the purpose of determining the amount of loss on a sale, then she must be considered to remain the owner for the purpose of deducting the loss.

---

*Italics the Court's.

CONCLUSION

We submit that Respondent's concession that the ownership of property determines who shall deduct a loss incurred on its sale disposes of this case. By making this concession Respondent assumes the burden of proving that the husband's estate is the owner of a greater interest in community property acquired after 1927 than was the husband during his lifetime.

The husband was not the owner of the wife's half during his lifetime, notwithstanding his broad powers of control; legal title to the wife's half remains vested in the wife after the husband's death, as Respondent tacitly admits; the wife's half "belongs" to her under Section 201 of the Probate Code; and the powers of the husband's executor or administrator over her half of the property are insignificant compared to the husband's powers. What is left, then, to support the argument that ownership of one-half the property, vested in the wife during the husband's lifetime, is transferred to her husband's executor or administrator pending administration of his estate, and reverts to the wife at the end of that period?

If the sale of the property involved here had been made during the husband's lifetime, petitioner would have been entitled to deduct one-half of the loss sustained, because she was the owner of one-half of the property. Her one-half was not includible in the husband's gross estate for estate tax purposes, because she was the owner of it. When the sale was made, the basis for determining gain or loss on the sale of her half was cost, again because she was the owner of the property. A decision

that the wife is not entitled to deduct half the loss because her husband's estate is the owner of the entire property for this purpose, although not for any other, would indeed be an anomaly, and we submit that there is no rational justification for such a decision.

Respectfully submitted,

THEODORE R. MEYER,
ROBERT H. WALKER,
111 Sutter Street,
San Francisco 4, California,
Attorneys for Petitioner.

No. 11115

United States

Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN BOX SHOOK EXPORT ASSOCIATION, a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court of the United States

Rotary Colorprint, 661 Howard Street, San Francisco

No. 11115

United States

Circuit Court of Appeals

For the Ninth Circuit.

AMERICAN BOX SHOOK EXPORT ASSOCIATION, a Corporation,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Transcript of the Record

Upon Petition to Review a Decision of the Tax Court of the United States

Rotary Colorprint, 661 Howard Street, San Francisco

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

APPEARANCES

For Taxpayer:

FRANK L. MUNCY,
W. R. WALLACE, Jr.

For Commissioner:

ARTHUR L. MURRAY, Esq.

Docket No. 777

AMERICAN BOX SHOOK EXPORT ASSOCIATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DOCKET ENTRIES

1943

Feb. 17—Petition received and filed. Taxpayer notified. Fee paid.

Feb. 17—Copy of petition served on General Counsel.

Mar. 17—Answer filed by General Counsel.

Mar. 17—Request for hearing at San Francisco filed by General Counsel.

Mar. 19—Notice issued placing proceeding on San Francisco, Calif., calendar. Service of answer and request made.

1943 Docket Entries—(Continued)

Oct. 14—Hearing set Nov. 22, 1943—San Francisco, Calif.

Nov. 22—Hearing had before Judge Arundell. Petitioner's counsel moves to continue to next San Francisco calendar. Motion granted. Motion filed. Appearance filed—W. R. Wallace, Jr.

1944

Aug. 10—Hearing set Sept. 18, 1944—San Francisco, Calif.

Sept. 20—Hearing before Judge Van Fossan on merits. Submitted. Briefs due Nov. 4, 1944. Replies 12/4/44.

Oct. 14—Transcript of hearing 9/20/44 filed.

Nov. 1—Brief filed by taxpayer. 11/6/44 Copy served.

Nov. 4—Brief filed by General Counsel. Served 11/6/44.

Dec. 1—Reply brief filed by taxpayer. 12/1/44 Copy served.

1945

Feb. 12—Findings of fact and opinion rendered, Van Fossan, J. Decision will be entered under Rule 50. Copy served.

Mar. 3—Computation of deficiency filed by General Counsel.

Mar. 10—Hearing set 4/11/45 on settlement.

Apr. 9—Consent to settlement filed by taxpayer.

Apr. 11—Decision entered, Van Fossan, J., Div. 9.

July 5—Bond in the sum of $6,444.94 approved and ordered filed.

1945 Docket Entries—(Continued)

July 5—Petition for review by U. S. Circuit Court of Appeals, Ninth Circuit, filed by taxpayer, with proof of service thereon.

July 5—Designation of record filed by taxpayer with proof of service thereon.

July 5—Affidavit of service by mail of petition for review and designation of record filed. [1*]

The Tax Court of the United States

Docket No. 777

AMERICAN BOX SHOOK EXPORT ASSOCIATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IRA:90-D-HOB dated December 9, 1942, and as a basis of his proceeding alleges as follows:

1. The petitioner is a corporation organized and existing under the laws of the State of California. The principal office of the corporation is at One Montgomery Street, San Francisco, California. The

*Page numbering appearing at top of page of original certified Transcript of Record.

returns for the period here involved were filed with the collector for the first district of California.

2. The notice of deficiency (a copy of which is attached and marked exhibit A) was mailed to the petitioner on December 9, 1942.

3. The taxes in controversy are income and excess profits taxes for the fiscal year ended May 31, 1941 in the total amount of $3,222.47.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner of Internal Revenue hereinafter referred to as the "respondent" erred in determining a deficiency in the petitioner's income tax for the fiscal year ended May 31, 1941 in the amount of $2,952.15 or in any other or lesser amount. [2]

(b) The respondent erred in determining a deficiency in the petitioner's excess profits tax for the fiscal year ended May 31, 1941 in the amount of $1,270.32 or in any other or lesser amount.

(c) The respondent erred, when, in referring to certain payments made to member mills as additional realization on sales of shook shipped, he stated "* * * distributions * * * constitute a dividend paid out of the profits of the corporation and is not deductible".

(d) The respondent erred when he stated, concerning the payments to member mills of additional realization that " * * * No binding obligation to make such payments was in existence before the profits were earned".

(e) The respondent erred in disallowing a reserve for claims against defective shook in the amount of $4,000.00

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) The petition was organized as a non-profit association for the purpose of conducting export trade at cost in behalf of its members. The association was availed of to handle the foreign trade of the respective members, chiefly to simplify the preparation of export documents and to eliminate the necessity of individual members keeping in touch with foreign exchange fluctuations, and similar details of export trade. Further, it has been the policy of the association to settle with its members on the basis of a preliminary billing price for shook furnished, with the definite understanding that any excess received from the sale of shook over expenses would be subject to distribution as additional realization on shipments made during the period when such excess was accumulated. This intention is specifically expressed in the minutes of meeting held July 29, 1940. [3]

The exporting of box shook to customers in South Africa and European ports naturally would prolong the accounting upon any such shipment. Due to the disturbed world market the petitioner has been unable to function as smoothly with its long range customers, particularly where claims or allowances are involved. The Association intended from its inception to operate on a non-profit basis. By dealing with its member mills on a preliminary

billing basis, the Association management was able to operate without assessing the member mills. Had the Association paid out immediately to the member mills the exact amount of the expected realization on each cargo shipment, there would have been no funds to provide for claims, allowances, losses or any other contingencies, other than by assessing the member mills as the need arose. The petitioner recognizes the necessity of some working capital and was content to pay tax on a limited amount of undistributed additional realization as was manifest by the tax assessed by the original returns filed. The petitioner maintains that its transactions with its respective members has been at arms length and that it has the right to adjust the preliminary billing price when the final realization is determined on each cargo shipment within the taxable year. The assertion of this right is in harmony with the practice existing in normal business transactions between buyer and seller.

In the case of the Midland Cooperative Wholesale 44 BTA 824, the opinion states:

"* * * The Treasury department, however, as pointed out in Fruit Growers Supply Co., 21 BTA 315, 326; affd., 56 Fed. (2d) 90, with 'great liberality' has allowed such deductions 'to the end that substantial justice may be done to an association which is engaged in cooperative marketing or purchasing work but which may not be exempt from taxation'. The justication for the ruling rests upon the fact that the so-called dividends are in reality rebates upon the business transacted by the

association with its members rather than true income to the association * * *'' [4]

(b) The reserve for claims against possible loss on mouldy or defective shook, overcharges, rebundling, freight adjustments, etc., has been disallowed by the respondent on that grounds that the amount was indefinite, unsettled, and lacking in proof. Petitioner has paid or allowed, subsequent to the close of fiscal year ended May 31, 1941, $1,329.68 applying against a portion of the anticipated loss claim. Certain items are yet to be fully determined and petitioner contends that the original reserve is a fair estimate of the liability which will ultimately be paid or allowed to the customers.

Wherefore, the petitioner prays that this Court may hear the proceeding and

(a) Determine that there is no deficiency in the petitioner's income tax for the fiscal year ended May 31, 1941;

(b) Determine that there is no deficiency in the petitioner's excess profits tax for the fiscal year ended May 31, 1941.

(Sgd.) FRANK L. MUNCY,
Counsel for the Petitioner.

State of California,
County of San Francisco—ss.

Ward A. Dwight, being duly sworn, says that he is President of American Box Shook Export Association, the petitioner above named and as such officer is authorized to verify the foregoing petition, that he has read the foregoing petition and is familiar

with the statements contained therein and that the statements contained therein are true.

(Sgd.) WARD A. DWIGHT

Subscribd and sworn to before me this 11th day of February, 1943.

(Sgd.) LEONTINE E. DENSON,
Notary Public for California

My commission expires August 12, 1943. [5]

EXHIBIT A

Form 1232 SN-1T-3
Office of
Internal Revenue Agent in Charge
San Francisco Division
IRA:90-D-HOB
(C:TS:PD
SF:WGW)

Treasury Department
Internal Revenue Service
74 New Montgomery Street
San Francisco, California

December 9, 1942

American Box Shook Export Association
407 Crocker Building
San Francisco, California

Gentlemen:

You are advised that the determination of your income tax liability for the taxable year ended May 31, 1941 discloses a deficiency of $1,952.15 and that the determination of your excess-profits tax liability for the year mentioned discloses a deficiency of $1,270.32 as shown in the statement attached.

In accordance with the provisions of existing internal revenue laws, notice is hereby given of the deciencies mentioned.

Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with The Tax Court of the United States for a redetermination of the deficiencies.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Internal Revenue Agent in Charge, San Francisco, California, for the attention of Conference Section. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiencies and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,
GUY T. HELVERING
Commissioner,
(Signed) By F. M. HARLESS
Internal Revenue Agent in
Charge.

Enclosures:
Statement
Form of waiver.
(In. RR) [6]

STATEMENT

San Francisco
IRA:90-D
HOB
(C:TS:PD
SF:WGW)

American Box Shook Export Association,
407 Crocker Building,
San Francisco, California.

Tax Liability for the Taxable Year Ended May 31, 1941

	Liability	Assessed	Deficiency
Income Tax	$4,067.07	$2,114.92	$1,952.15
Excess profits tax	2,566.78	1,296.46	1,270.32

In making this determination of your income and excess profits tax liability, careful consideration has been given to your protest dated May 30, 1942 and to the statements made at the conferences held on July 15, 1942, October 6, 1942, and October 8, 1942.

A copy of this letter and statement has been mailed to your representatives, Mr. Frank L. Muney, 1 Montgomery Street, San Francisco, California, in accordance with the authority contained in the power of attorney executed by you and on file in this office.

ADJUSTMENTS TO NORMAL TAX NET INCOME

Net income as disclosed by return		$13,317.66
Unallowable deductions and additional income:		
(a) Distribution to stockholders	$ 7,559.11	
(b) Incorporation expense	335.71	
(c) Accounting fee	150.00	
(d) Reserve for claims	4,000.00	12,044.82
Total		$25,362.48
Nontaxable income and additional deductions:		
(e) Franchise tax	$ 159.30	
(f) Capital stock tax	660.00	819.30
Net income adjusted		$24,543.18

EXPLANATION OF ADJUSTMENTS

(a) On or about May 31, 1941 you distributed, out of your net income, amounts aggregating $7,559.11 to certain lumber mills, that were stockholders, or that had subscribed to your stock. You claimed the above-mentioned amount as a deduction. The distribution was based upon the board feet of box shook shipped by each mill. No binding obligation to make such payments was in existence before the profits were earned. It is held that the above-named amount constituted a dividend paid out of the profits of the corporation and is not deductible.

(b) Incorporation expense of $335.71 claimed as a deduction in your return is disallowed as not being an ordinary and necessary business expense.

(c) An accounting fee of $150.00 claimed as a deduction in your return, representing expense incurred by American Box Shook Export Association (unincorporated), another taxpayer, is disallowed as not being an expense deductible by you since it was the expense of another taxpayer.

(d) On your income tax return you claimed a deduction of $4,000.00 for an alleged loss respecting box shook shipped by you to a foreign port, on the alleged grounds that the customer contended that said shook was mouldy. No part of the above-mentioned amount has been paid, nor has proof been submitted that you have allowed the claimant any part of said amount. On the basis of the information available it is held that the amount is not deductible.

(e) State Franchise tax of $159.30 accrued for the taxable year ended May 31, 1941, is allowed as a deduction in your return.

(f) Capital stock tax of $660.00 accrued for the taxable year ended May 31, 1941, is allowed as a deduction in your return.

COMPUTATION OF TAX

Declared Value Excess-Profits Tax:	
Net income for declared value excess-profits tax computation	$24,543.18
Less: 10 per cent of $350,000.00, value of capital stock as declared in your capital stock tax return for the year ended June 30, 1940	35,000.00
Balance subject to declared value excess-profits tax	None
Declared value excess-profits tax assessable	None
Declared value excess-profits tax assessed	None

Income Tax:		
Net income for declared value excess-profits tax computation		$24,543.18
Less: Declared value excess-profits tax		None
Normal tax net income		$24,543.18
Portion (not in excess of $5,000. taxable at 13.5%)	$15,000.00 at 13.5%	$ 675.00
Portion (not in excess of $20,000. taxable at 15%)	$15,000.00 at 15%	2,250.00
Portion (in excess of $20,000. taxable at 17%)	$ 4,543.18 at 17%	772.34
Total income tax		$ 3,697.34
Income defense tax (10% of $3,697.34)		369.73
Total income and income defense taxes assessable		$ 4,067.07
Income tax assessed:		
Original, account Aug. 1941 No. 410041—First California District		2,114.92
Deficiency of income tax		$ 1,952.15

ADJUSTMENTS TO EXCESS-PROFITS NET INCOME COMPUTATION EXCESS-PROFITS CREDIT BASED ON NET INCOME

Excess-profits net income computed under income credit method, as disclosed by return		$11,202.74
Increase:		
(a) Net increase in normal tax net income	$11,225.52	
Decrease:		
(b) Additional income tax	1,952.15	
Net increase		9,273.37
Excess-profits net income computed under income credit method, as adjusted		$20,476.11

EXPLANATION OF ADJUSTMENTS

(a) The net increase in normal tax net income is explained in the foregoing.

Total increases	$12,044.82
Total decreases	819.30
Net increase	$11,225.52

(b) Additional deduction of $1,952.15 is allowed for additional income tax as computed in the foregoing.

ADJUSTMENT TO EXCESS-PROFITS CREDIT—BASED ON INCOME

	Year Ended 5-31-37	Year Ended 5-31-38	Year Ended 5-31-39	Year Ended 5-31-40
Excess-profits net income as reported on the return	$ 0.00	$ 108.53	$(6,242.44)	$ 2,682.25
Increase: (a)	1,089.32	1,244.08	None	13,328.85
Total	$1,089.32	$1,352.61	$(6,242.44)	$16,011.10
Decrease: (b) Income Tax	163.40	202.89	None	1,870.67
Excess-profits net income as adjusted	$ 925.92	$1,149.72	$(6,242.44)	$14,140.43

Net aggregate of above (excluding 1939 deficit)	$16,216.07
Average base period net income—general average for 4 years (¼ of $16,216.07)	$ 4,054.02
(c) Average base period net income—Increased earnings in last half of base period	$ 5,404.59
95% of average base period net income (95% of $5,404.59)	$ 5,134.36
(d) Net capital addition	$1,008.29
(e) Net capital reduction	$ 100.19
8% of net capital addition	$ 80.66
6% of net capital reduction	6.01
Net addition	74.65
Excess-profits credit—based on income	$ 5,209.01

EXPLANATION OF ADJUSTMENTS

(a) It is noted that you were organized on March 26, 1940 and on June 1, 1940 you took over the business of a predecessor association which had operated in an unincorporated status. Under the provisions of section 740 (d) (1) of the Internal Revenue Code, as an acquiring corporation your base period is the forty-eight months preceding the beginning of your taxable year ending May 31, 1941.

In determining the base period income, allocation is made of the net income of the predecessoer association for the calendar year to a fiscal year to conform with your fiscal year ending May 31.

Year ended May 31, 1937	
Net income:	
7/12 of $344.04 (1936 net income)	$ 200.69
5/12 of $2,132.71 (1937 net income)	888.63
Total net income	$1,089.32
Amount reported	None
Increase	$1,089.32
Year ended May 31, 1938	
Increase:	
7/12 of $2,132.71 (1937 net income)	$ 1,244.08
Year ended May 31, 1939	
Net income (Loss) as reported	$(6,242.44)
No change recommended.	
Year ended May 31, 1940	
Net income (Loss)	$(3,712.13)
Net increase in taxable net income	13,328.87
Net income as adjusted	$ 9,616.74
Add: 1939 net operating loss included in above income now eliminated	15,346.47
Actual net income for period January 1, 1940 to May 31, 1940	$24,963.21
Deduct: 1939 net operating loss prorated— 7/12 of $15,346.47	8,952.11
Net income as adjusted	$16,011.10
Income reported	2,682.25
Increase	$13,328.85

(b) Deduction for income taxes for the base period years is computed in accordance with section 30.742-1(b)(5) regulations 103, as though the unincorporated association were a corporation.

(c) The amount of increased earnings in the last half of the base period is computed as follows:

Deficit May 31, 1930	$(6,242.44)	
Earnings May 31, 1940	14,140.43	
Net aggregate of last half of base period		$ 7,897.99
Earnings May 31, 1937	$ 925.92	
Earnings May 31, 1938	1,149.72	
Net aggregate of first half of base period		2,075.64
Net increase		$ 5,822.35
Average ($5,822.35 divided by 2)		$ 2,911.18
Net aggregate of last half		7,897.99
Total		$10,809.17
Above amount divided by number of months in second half of base period multiplied by 12 ($10,809.17 / 24) time 12		$ 5,404.59

(d) Under the provisions of section 743(b)(1) of the Internal Revenue Code contributions of capital made prior to the acquisition of the component corporation are disregarded in computing the net capital addition of such component corporation.

The net capital addition is computed on the basis of cash contributed in payment of capital stock as follows:

6-24-40	$ 345.00 at 341/365	$ 322.32
9-18-40	155.00 at 255/365	108.29
9-24-40	310.00 at 249/365	211.48
10-11-40	155.00 at 232/365	98.25
12-31-40	155.00 at 151/365	64.12
1-31-41	620.00 at 120/365	203.83
	$1,740.00	$1,008.29
Net capital additions		$1,008.29

(e) The net capital reduction allowable to you as an acquiring corporation is based upon the refund of capital investments, as follows:

2-14-41—1 membership of $345.00—	
(106/365 times $345.00)	$ 100.19

The cancellation of subscriptions on May 28, 1941 is not restored to capital stock account since the amount was not refunded until June 30, 1941 which is not within the taxable year ended May 31, 1941.

COMPUTATION OF EXCESS-PROFITS TAX

Excess profits net income		$20,476.11
Less:		
Specific exemption	$5,000.00	
Excess-profits credit	5,209.01	10,209.01
Adjusted excess profits net income		$10,267.10
Portion not in excess of $20,000. taxable at 25%		
$10,267.10 Tax at 25%		$ 2,566.78
Correct excess-profits tax liability		$ 2,566.78
Excess-profits tax assessed:		
Original, Aug. 1941, Account No. 400007		
First California District		1,296.46
Deficiency in excess-profits tax		$ 1,270.32

[Endorsed]: T.A.U.S. Filed Feb. 17, 1943.

[Title of Tax Court and Cause.]

ANSWER

Comes now the Commissioner of Internal Revenue, respondent above named, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal

Revenue, and for answer to the petition filed by the above-named petitioner, admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. (a) to (e), inclusive. Denies that the determination of tax set forth in the notice of deficiency is based upon errors as alleged in paragraph 4 and subparagraphs (a) to (e), inclusive, thereunder, of the petition.

5. (a) For lack of information and belief denies all material allegations contained in subparagraph (a) of paragraph 5 of the petition. [14]

(b) For lack of information and belief denies all material allegations contained in subparagraph (b) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation in the petition not hereinbefore admitted, qualified, or denied.

Wherefore, it is prayed that the Commissioner's determination be approved and the petitioner's appeal denied.

(Signed) J. P. WENCHEL TMM
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

ALVA C. BAIRD,
Division Counsel.
ARTHUR L. MURRAY
T. M. MATHER,
Special Attorneys,
Bureau of Internal Revenue.

[Endorsed]: T.C.U.S. Filed Mar. 17, 1943. [15]

[Title of Tax Court and Cause.]

4 T. C. No. 90
Docket No. 777
Promulgated February 12, 1945

The petitioner was organized under the general corporation laws of California. Neither its articles of incorporation nor its by-laws nor any contract required that amounts received in excess of cost be distributed to its members on a patronage basis. No amounts were distributable except upon action by the board of directors. Held, (1) petitioner is not a true cooperative and is subject to tax upon its income; (2) petitioner is not entitled to a deduction for amounts actually distributed during the year.

W. R. Wallace, Jr., Esq., and Frank L. Muney, C.P.A., for the petitioner

Arthur L Murray, Esq., for the respondent

The respondent determined deficiencies in income and excess-profits taxes against American Box Shook Export Association for its fiscal year ended May 31, 1941, as follows:

Income tax	$1,952.15
Excess profits tax	1,270.32

The principal issue now in controversy is whether any of the amounts received by the petitioner during the year in question are taxable [26] to it as its income. In the event this issue is decided in the respondent's favor, a second issue is presented, whether the sum of $7,559.11, paid by the petitioner to its members during the taxable year, may properly be deducted from gross income.

FINDINGS OF FACT

The petitioner is a corporation organized on March 26, 1940, under the general corporation laws of the State of California. Its income, declared value excess profits and defense tax return and its excess profits tax return for the year involved were prepared on the accrual basis and were filed with the collector of internal revenue for the first district of California on August 15, 1941.

The petitioner was organized to succeed an unincorporated association of the same name, which was organized in 1935.

The petitioner is a sales organization engaged in the purchase of box shook, i.e., unassembled parts of wooden boxes, exclusively for export purposes. During the year in controversy, it purchased shook from its member-stockholders only. It has twelve such members, all of whom are associations engaged either in the manufacture or distribution of lumber products, or both. The shook so purchased by the

petitioner was sold by it to its customers in foreign countries.

The petitioner does not make purchases from its members upon any standard rate or price basis. When an order for shook is placed by a foreign customer, the petitioner first obtains the necessary data from the customer, including information as to specifications, shipping schedule and quantity. It then contacts its members to ascertain the "minimum [17] satisfactory price" at which the members would agree to handle the particular order.

These negotiations with the members usually are not reduced to writing. The petitioner conducts its business with its members in an informal manner, much of it being handled by telephone.

After it obtains the minimum price at which the members will produce the shook, the petitioner endeavors to secure a higher price from the customer. This usually amounts to an additional margin of from 8 per cent to 10 per cent of the original "minimum" price. It is added to provide against unforeseen items of expense.

The members bill the petitioner for shook sold on the basis of the "minimum" price and the petitioner settles with them currently on that basis at a discount. This is done since the final profit from the transaction cannot be determined for some time owing to the distances which the products must travel and the unforeseen expenses which may arise.

Neither the articles of incorporation nor the by-laws of the petitioner require that amounts received

by it in excess of the cost of the goods sold should be distributed to its members upon any patronage basis. There is an understanding, however, between the petitioner and its members that any amounts received in excess of actual cost, with the exception of amounts placed in a reserve for anticipated claims, is to be returned to them.

At the close of the fiscal year the directors determined the amount of profits which could be distributed without endangering the [18] reserve fund. These amounts were distributed to the members upon the basis of the amount of board feet of shook which each shipped during the year.

On or about May 28, 1941, the petitioner made distributions to its members out of earnings of that year totaling $7,559.11.

In its income tax return the petitioner reported total income of $50,865.03 and net taxable income of $13,317.66. It did not include in its gross income either the amounts distributed to the members during that year nor the sum of $4,000 entered in its books as a reserve for anticipated claims. It now concedes the non-deductibility of the latter item in the event it is determined that the corporation is taxable.

OPINION

Van Fossan, Judge:

The fundamental issue before us is whether the petitioner had any taxable income of its own or whether its income was actually, at all times, the income of its members. In the event our determination of this issue is adverse to the petitioner a

further issue arises, namely, whether the petitioner is entitled to a deduction in the amount of the distributions made to its members on May 28, 1941.

There may be some question whether the first-stated issue was properly raised in the pleadings. Although the respondent directed attention to the alleged defect at the hearing, no motion to amend the petition was made and the respondent consequently contends that the issue is not properly before the Court. However, we do not choose to [19] rest our decision on the possible defect in the pleadings for, assuming that the issue was properly raised, the petitioner can not be sustained.

The petitioner relies on no specific statutory provision for exemption but asks us to find that it was merely an agent for its members,—a mere conduit through which the income flowed,—and that all its earnings were in reality the property of its members and not its own taxable income. This we can not do.

The petitioner was organized under the general corporation laws of California, not under the statutes providing for cooperative associations. No explanation was given for this action. The statutes under which an association is organized are not controlling, however, if it is actually organized and operates as a true cooperative. Eugene Fruit Growers Association, 37 B.T.A. 993; United Cooperatives, Inc., 4 T. C. 93. In order to be a true cooperative, there must be a legal obligation on the part of the association to return to the producers, o n a patronage basis, all funds received in excess

of the cost of the goods sold. Such an obligation may arise from the association's articles of incorporation, its by-laws, or some other contract. Midland Cooperative Wholesale, 44 B.T.A. 824.

Here we find no evidence of such a legal obligation. There was no provision in either its articles or by-laws requiring the petitioner to distribute all its profits to its members on a patronage basis. Neither were there any express written contracts with the members to that effect. The most we find was an "understanding" between the peti- [20] tioner and its members that all sums received in excess of the cost of selling the shook and in excess of the amounts placed in the reserve for anticipated claims, should be returned to the members.

It does not appear, however, that this understanding was carried out in practice. During the year in controversy the petitioner made distributions to its members of $7,559.11 and had in its reserve the sum of $4,000. Yet it reported a taxable income, after deducting both of these items, of $13,317.66. What disposition was to be made of this amount, we do not know. There is nothing in the record to show that it could not be used for the payment of dividends on the stock, or for any other purpose. Other than the amounts actually distributed to the members, of which we shall speak later, there is nothing to show that the petitioner's earnings were not its own which it could use for any ordinary corporate purpose.

In support of its contention, the petitioner relies principally upon San Joaquin Valley Poultry Pro-

ducers' Association v. Commissioner, 136 Fed. (2d) 382. However, the facts in that case were materially different from those before us. There the petitioner was organized under the Agricultural Code of California, which provided that "Associations organized (under Chapter 4 thereof) shall be deemed 'non-profit', inasmuch as they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers." The petitioner's articles of incorporation provided that it "shall conduct and carry on its business without profit to itself." Its by-laws provided that it "is organized as a nonprofit cooperative association"; [21] and that "The 'net proceeds' resulting from the operation of the business, if any, shall belong to the members."

The petitioner in that case engaged in the business of marketing eggs for its members and selling supplies to its members and others. It did not pay its members the entire net proceeds of the eggs that it marketed for them but retained certain amounts which it placed in three reserves, crediting to the members the proportionate share of each in the sums so retained. It was the amounts so retained which the respondent sought to tax.

The Court held that the sums in question were not the property of the petitioner but were that of its members; that to hold otherwise would be to hold that the petitioner could and did make a profit for itself in contravention of its by-laws, its articles of incorporation, and the statute to which it owes its existence. It was pointed out that the petitioner

never pretended to be the owner of the sums but as required by its by-laws, prorated and credited them to its members. The court concluded that, since none of the sums ever belonged to the petitioner, they could not be, and were not, its income.

Here, however, as we have noted, neither the statute under which it was incorporated, its articles of incorporation, its by-laws nor any other contract forbade the petitioner from having income of its own. Under such circumstances, it can not be said that the petitioner's income was actually that of its members.

We turn, therefore, to a consideration of whether or not the petitioner is entitled to deduct from its gross income those amounts which [22] it actually distributed to its members during the year in question. Deductions are available to taxpayers only by virtue of statutory provisions. Not every payment out of income creates a legal deduction. Here again the answer turns upon whether or not the right of the members to these amounts arises by reason of the corporate charter or by-laws or some other contract, and is not dependent upon some subsequent corporate action taken by the officers or directors. United Cooperatives, Inc., supra; Midland Cooperative Wholesale, supra. The petitioner contends that such a right inhered in its members and that it is entitled to the deduction. The respondent asserts that the petitioner was under no legal obligation to make the payments and that the distributions were in the nature of dividends, hence not available as statutory deductions.

As we have indicated above, there was nothing in the petitioner's articles of incorporation or by-laws imposing upon it the obligation to distribute its excess revenue among its members. The question is, therefore, narrowed to whether or not such an obligation existed because of some other contract or contracts between the petitioner and its members.

The petitioner contends that such a contract existed by virtue of the "understanding" between the petitioner and its members that they were to receive all the profits in excess of cost and the additions to the reserve. This contention is not borne out by the evidence. The testimony shows that it had originally been contemplated that excess revenue should be distributed by way of dividends on the stock. At a [23] meeting of the stockholders, held May 6, 1940, a motion was made that the by-laws be amended to effect the distribution of excess revenue among the members upon the basis of the dollar value of shipments made by each member. This amendment was never put into effect. It was finally decided that the basis for distribution, proposed in the motion, was not practicable and that "the only fair method of distribution" was upon the basis of board feet of shook shipped by each member. However, no formal action in this regard was ever taken.

It is apparent from the record also that no amounts were distributable to the members without prior action on the part of the petitioner's board of directors. This is shown by the following excerpt

from the minutes of the meeting of the Association held July 29, 1940:

> Attention was further called to the fact that the Association had been set up as a non-profit organization with the understanding that any excess received from the sale of shook over expenses would, upon action of the organization, be subject to distribution as additional realization on shipments made during the period when such surplus was accumulated. [Emphasis supplied.]

This was likewise the understanding of the petitioner's members. One of the witnesses, who was general manager of a member association and a director of the petitioner, testified as follows:

> * * * We invoiced the American Box Shook Export Association at the minimum price, and that is all we did until later, if I would attend a meeting of the Export Association and as a director of the Association learn that it was contemplated paying another dollar per thousand to certain shipments, then I would go back to our office and set up a debit against the Association.

The taxpayer points to no statute authorizing the claimed deductions. Clearly they are not deductible expenses. The petitioner was under no obligation to make distributions to its members until the board [24] of directors had so acted. Whether the payments were in the nature of dividends we need not decide. But see Fontana Power Co., 43 B.T.A.

1090, affirmed 127 Fed. (2d) 193; Juneau Dairies, Inc., 44 B.T.A. 759. We are of the opinion that the petitioner is not entitled to the deduction in any event and that the respondent's determination must be susained.

Decision will be entered under Rule 50. [25]

The Tax Court of the United States
Washington

Docket No. 777

AMERICAN BOX SHOOK EXPORT ASSOCIATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DECISION

Pursuant ot the Court's Findings of Fact and Opinion, promulgated February 12, 1945, the respondent having filed a recomputation of tax on March 3, 1945, and the petitioner having filed an acquiescence in said recomputation on April 9, 1945, it is

Ordered and Decided: That there are deficiencies in income tax and excess-profits tax in the respective amounts of $1,952.15 and $1,270.32 for the fiscal year ended May 31, 1941.

Entered April 11, 1945.
(Signed) ERNEST H. VAN FOSSAN
Judge. [26]

Before The Tax Court of the United States

Docket No. 777

In the Matter of

AMERICAN BOX SHOOK EXPORT ASSOCIATION,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Room 401, Civic Auditorium,
San Francisco, California
September 20, 1944—9:30 a.m.

(Not pursuant to notice.)

Before: Honorable Ernest H. Van Fossan, Judge.

PROCEEDINGS

The Clerk: At this time we call Docket No. 777, American Box Shook Export Association.

Mr. Murray: Ready for the Respondent.

The Clerk: Will you state your appearances for the record, please?

Mr. Wallace: For the Petitioner, W. R. Wallace, Jr., and Frank L. Muney.

Mr. Murray: For the Respondent, Arthur L. Murray.

Mr. Wallace: Shall I proceed with the opening statement, Your Honor?

The Court: What is the name of the second gentleman?

Mr. Wallace: Muncy, M-u-n-c-y; Frank L. Muncy.

The Court: You may proceed with the opening statement.

OPENING STATEMENT ON BEHALF OF THE PETITIONER

By Mr. Wallace

Mr. Wallace: If Your Honor please, the Petitioner in this matter is a California corporation, organized on March 26, 1940, to succeed an unincorporated Association of the same name, which in turn was organized in 1935. The corporation and its predecessor Association were both registered under the Webb-Pomerene Act to permit the corporation to engage only in the export trade. [30]

As stated upon its tax return, its sole and only business was the exporting of lumber products for its various member under the condition of the Webb-Pomerene Act.

The corporation, during the taxable year and since, has had twelve members. All of those members are engaged either in the manufacture or in the sale of lumber and lumber products, or in both the manufacture and sale.

It made no purchases of lumber or lumber products from any but its members. We don't have a case where there is some business with members and some business with non-members.

The tax here involved is for the fiscal year of June 1, 1940 to May 31, 1941. The Commissioner has levied an additional tax on two principal items.

The first is an item of $7,559.11, which the corporation paid to its members during the fiscal year as additional realization on shipments made during that year, and the second is the sum of $4,000, which was set up on the books of the corporation as a reserve for anticipated claims.

There are three questions involved in the case.

The first and broad question is whether a corporation whose sole business is to export lumber products for its members without profit is subject to a tax at all, or whether its income is not the income of its members and to be taxed to them under the doctrine of the San Joaquin Valley Poultry [31] Producers Association cases, and the California Pine Box Distributors case, and other similar cases.

If this first question should be answered in the affirmative by the Tax Court, the other questions are of no consequence. If the first question, however, should be answered in the negative, then there are two other questions which arise.

The first of those questions is, Was the specific sum of $7559.11, which was paid by the corporation to its members during the fiscal year as additional realizations on sales, properly excluded from the in-

come tax returns filed by the corporation as income of the corporation?

The second question relates to the possible tax upon an item of $4,000 set up on the books of the corporation as a reserve for anticipated claims.

With respect to this last item, the only question raised by the Respondent Commissioner is whether the claims have been received and allowed during the taxable year. It is apparent, of course, that if the corporation is taxable at all, a bad debt or claim deduction can be asserted in the following year, and in the following year the claims were actually allowed and paid. We therefore agreed with counsel for the government to waive any contest on the tax on the $4,000 item for the fiscal year in question, in the event that it be determined that the corporation is taxable at all. [32]

Coming just for a moment to the pleadings. The government has admitted the first three paragraphs of the petition, that is, it has admitted the corporate status of the petitioner, the notice of deficiency, and that the taxes are taxes for the fiscal year ending May 31, 1941. All the other allegations of the petitioner have been denied.

There are a couple of other minor matters that I think I should clear in the pleadings before we proceed.

On Page 2 of the deficiency notice is the explanation as to the adjustments made by the Commissioner. The first has to do with the $7559.11 item, which was disallowed, and the explanation in that respect, to quote the letter, "No binding obligation

to make such payments was in existence before the profits were earned." That presumably being the Commissioner's position.

The item marked (b), incorporation expense of $335, we are making no contest about at all, so that may be disregarded.

The item marked (c), accounting fee of $150, we also make no contest about. That may be disregarded.

The item marked (d), which is the $4,000 item set up to cover anticipated claims I just referred to in the opening statement. We will have no contest on that.

The other two items referred to, paragraphs (e) and (f), have been allowed, and there is no contest on those [33] items.

The Court: Mr. Murray.

OPENING ARGUMENT ON BEHALF OF THE RESPONDENT

By Mr. Murray:

Mr. Murray: If Your Honor please, I would like to call attention to the fact that, according to my understanding, the matter of the taxable status of this corporation was not pleaded. That is why in the 90-day letter, as counsel has stated, the reason given was that no binding agreement was in existence, referring only to the $7559.11 item, which was claimed as a deduction, as an addition to cost of goods sold, so I submit that there has been no issue of that kind raised in the pleadings at all, so that is something new.

It is true that the government's position, answering fully the contentions of the taxpayer's representatives up to now has been that this item which they distributed to their shareholders during the taxable year is not an allowable deduction on any basis. As a matter of fact, they used it as a cost of goods sold, as an additional deduction, and we have denied that, and those are the issues as I understand them in this case.

Mr. Wallace: If I may just make a remark as to that?

I call counsel's attention to Page 2 of the petition, and on that page, paragraph 5 states: [34]

"The petitioner was organized as a non-profit Association for the purpose of conducting export trade at cost in behalf of its members."

That seems to be the first fact which was to be relied upon. The second is that:

"The Association was availed of to handle the foreign trade of the respective members, chiefly to simplify the preparation of export documents and to eliminate the necessity of individual members keeping in touch with foreign exchange fluctuations, and similar details of export trade. Further, it has been the policy of the Association to settle with its members on the basis of a preliminary billing price for shook furnished, with the definite understanding that any excess received from the sale of shook over expense would be subject to distribution as additional realization on shipments made during the period when such excess was accumulated. * * *"

The Court: Those statements appear in the paragraph which deals with tacts in the petition?

Mr. Wallace: That is correct, Your Honor. I refer to them now only as a preliminary to what I was about to say.

It is true, as counsel for the government has suggested, that as the petition was drawn the objections urged in the petition——

The Court (Interposing): You mean the errors alleged? [35]

Mr. Wallace: I beg your pardon?

The Court: You mean the errors alleged?

Mr. Wallace: The errors alleged in the petition are referred to the additional assessments. There is no question of that. The whole petition is directed toward the additional assessments.

The Court: Will you run over again the several paragraphs of the errors alleged, and indicate which ones are contested and which are not?

Mr. Wallace: Yes, Your Honor.

The Court: On Page 1 of the petition.

Mr. Wallace: The first three paragraphs of the petition are not contested by the government. They have been admitted in the pleadings. The paragraphs in the petition numbered 4, 5——

The Court: I understand they have been denied.

Mr. Wallace: They have been denied.

The Court: I understood you to say, though, that some of these errors were not in issue?

Mr. Wallace: Yes, Your Honor.

Now, coming to that, if Your Honor will turn in the petition to Page 2 of the letter attached to it——

The Court: Let us look at the petition itself. How about error 4(a)? Is that in issue?

Mr. Wallace: That is in issue, Your Honor, and 4(b) is in issue, and 4(c) is in issue, and 4(d) is in issue.

4(e), Your Honor, is not in issue, except that it is our contention that, as a non-profit organization, the petitioner was not taxable at all.

If the Tax Court should hold that the petitioner was taxable at all, then the specific question of a tax upon this $4,000 item is not in dispute as between us.

The Court: Will you proceed with the evidence?

Mr. Wallace: Mr. Hudson, please.

Whereupon,

C. D. HUDSON

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: May we have your name, please, sir?

The Witness: C. D. Hudson.

By Mr. Wallace:

Q. Where do you reside, Mr. Hudson?

A. Washington, D. C.

Q. What is your business?

A. I am manager of the American Box Shook Export Association, and manager of the National Wooden Box Association.

Q. The first company referred to, the American

(Testimony of C. D. Hudson.)

Box Shook Export Association is the taxpayer involved in this litigation? [37] A. It is.

Q. How long have you been the general manager of the American Box Shook Export Association? A. Since its organization.

Q. When was that?

A. It was first organized in 1935 as an unincorporated, non-profit Association, and then in 1939 the corporation was formed under the same name.

Q. And you have continued as general manager from incepiton to date? A. I have.

Q. And you were general manager during the taxable year here in question, the June 1, 1940 to May 31, 1941? A. Yes.

Q. What is the business of the petitioner corporation?

A. The exportation of box shook, primarily, and to date, solely. We might export other lumber products, but the volume has been confined to box shook.

Q. Do you do any domestic business?

A. None whatever.

Q. Have you ever done any domestic business?

A. No.

The Court: For the purposes of the record, what is a shook?

The Witness: It is component parts of a wooden box [38] before assembly, merely an unassembled wooden box.

(Testimony of C. D. Hudson.)

By Mr. Wallace:

Q. How many members are there in the petitioner corporation? A. Twelve.

Q. Can you list those members for us?

A. New England Box Company—Do you wish the addresses?

Q. I don't think it is important. I wish you would just, when you are listing them, state whether they are manufacturers or sellers of lumber, or both? A. Yes.

Mr. Murray: May I ask whether this list which you are giving are the members of this Association before the Court, or the other Association which you referred to?

The Witness: Members of the American Box Shook Export Association, Incorporated, and now before the Court.

New England Box Company, manufacturers; E. H. Barnes Company, manufacturers; Western Pine Mfg. Co., Ltd., manufacturers; the Brewer Pine Box Company, manufacturers; the White Pine Sash Company, manufacturers; Ewauna Box Company, manufacturers; the Kesterson Corporation—I believe that is——

Mr. Wallace: Lumber Corporation?

The Witness: Lumber Corporation, manufacturers; the Weyerhaeuser Sales Company, a sales organization. [39]

The Court: Is that Weyerhaeuser?

The Witness: Yes, W-e-y-e-r-h-a-e-u-s-e-r?

The American Box Corporation, manufacturers

(Testimony of C. D. Hudson.)

and sales organization; the Western Pine Box Distributors, sales organization; the California Pine Box Distributors, sales organization; the Dwight Lumber & Box Co., sales organization.

By Mr. Wallace:

Q. So that the record will be clear, will you state what you mean by a sales organization?

A. An organization primarily handling the sales of one or more manufacturers, either on a cost basis or on the usual wholesale commission basis.

Q. Does your corporation, American Box Shook Export Association, do any business with any lumber manufacturing or lumber sales organization or corporation in the United States, except its own members? A. No.

Q. Has it done any business except with its own members? A. No.

Q. Did it do any business except with its own members in the fical year in question?

A. No, it did not.

Q. Will you explain to us the manner in which you do business for your members in foreign trade?

A. We first develop an inquiry from a foreign export customer, secure the necessary information as to specifications and shipping schedule, quantity, and then we contact our members to see whether they might be interested. We find out what price might be the minimum at which they would be willing to handle this business, to determine what shipping schedules might be maintained, and after securing from our members a fairly firm commit-

(Testimony of C. D. Hudson.)

ment as to performance and as to the minimum price at which they would be willing to handle this business, we then make an offer to the customer, and by negotiation work out then a definite sale to the customer, based upon commitments made with our own members.

The Court: We will take a brief recess at this moment.

(Short recess.)

The Court: You may proceed.

Mr. Wallace: Will you read the last question and answer, please?

(Record read by Reporter.)

By Mr. Wallace:

Q. Mr. Hudson, in your answer to the last question, you said, "We do this and we do that." Whom did you refer to as "we"?

A. Well, I referred to myself, and, of course, the staff such as we have had at times. At the beginning, all [41] activities were handled almost exclusively by myself; in fact, all transactions and all commitments. As the organization has grown, it has been necessary to have an assistant sometimes here in San Francisco, and then again in Washington, as we now have. But I have personally handled and have supervised practically all of the sales and all of the commitments with members.

Q. Will you tell us what your duties as general manager of this Association are?

A. From the beginning they have been to make

(Testimony of C. D. Hudson.)

the sales and the foreign contacts, to arrange for production with our members, to arrange for financing, supervise the actual shipment, the loading, take care of the collection and pay the accounts; naturally supervise the keeping of the record and the other details.

Q. This Association has other officers, that is, a president and vice-president, and a secretary and treasurer? A. Yes.

Q. What are their duties?

A. Well, they are chosen from among the directors. Their duties might include countersigning of checks. They might on call, and when it may be necessary to lay down policies and to review activities, to check on the status of the foreign market, and to take care of other subjects which would be related to policy and the general conduct of the [42] organization.

Q. Well, the directors, I take it, each represent a member, each of the directors represents a member? A. That is right.

Q. There are no directors except as representatives of members? A. That's right.

Q. Who calls them together? Do you?

A. The president calls them. Usually I suggest to the president that it might be proper that there be a meeting of directors and possibly it may coincide with the trip I am making to the West Coast here, and then I issue the call in his name, and of course the annual meeting is determined by the by-

(Testimony of C. D. Hudson.)

laws. We attempt to conform to that as nearly as convenient.

Q. In your answer to a prior question, you referred to a minimum price. Will you explain a little what you intended to convey by that? You said you got a minimum price from your members.

A. Well, in presenting an inquiry to our members, we must necessarily include some items or some factors there that are not definitely fixed at the time, such as probably delivery requirements, approximate maximum requirements of the customer, and sometimes there is a little doubt about specifications. We talk those things over, and naturally we find [43] that our members are of different opinions. We then work out what would be known as a "minimum satisfactory price" to the majority of the members, generally to all who are engaged in that type of production. It is understood, however, that if we are able to secure a higher realization than that, we will do so. We will not commit any member to produce at less than that price. The hazards of export trade are numerous, and we cannot always anticipate what the expense will be of handling an order. We have to protect ourselves against unknown factors, such as the loss of shipping space, or increased insurance rates, or increased rail rates, sometimes. We must protect ourselves against claims which we may feel are just or unjust, which always involve not only the f.o.b. mill cost, but possibly the delivered cost, which frequently is twice as much as the f.o.b. mill.

(Testimony of C. D. Hudson.)

Under that arrangement then we have this mill price at which the mill will produce, and then it is our obligation to do our best to secure more than that.

Q. Then do you add something to that price to establish the price to the consumer in South Africa, we will say?

A. Yes, we add the usual margin, which is basically around 8 per cent. It might vary from 8 to 10 per cent, and if there are unknown factors of expense, we sometimes take those into account. Then in actually making the shipment, completing the sale, collecting the money, none of these contingencies may have developed. Some items of expense may have been [44] saved, and so our realization is a little more—our net realization is a little more, or the expense of doing business is a little less, which leaves a residue, and under our form of operation this residue must be considered as additional realizations. We attempt to set up a necessary reserve for such contingencies as may further develop, but anything above that necessary and justifiable reserve is looked upon purely as additional realization over and above the minimum price at which the member was willing to produce, which we might call a preliminary billing price.

To explain further, we settle with the member on the basis of that minimum price. We discount our bills. We must take advantage of every possible saving. We discount our bills; we pay our members within the discount period, and therefore

(Testimony of C. D. Hudson.)

it is necessary to have some fixed price which we may make a settlement. Frequently it is not known before months later, whether a given sale or a transaction has been more or less favorable than anticipated; therefore the final adjustment must come months and a considerable time after the preliminary or the billing price has been paid and the transaction more or less closed up to that point.

Q. You say that it is frequently months later. Where did you sell most of your shook?

A. The great bulk has gone to South Africa. Of course, we have sold—I believe during the same period we shipped to [45] the Persian Gulf; we shipped down into the Indian Ocean; we have shipped quite a volume to the United Kingdom. We have shipped some to Ireland; one or two shipments to South America.

Q. Then you cannot finally close your books and determine how much money you have made, what the final realization is on a particular shipment until the shipment has got there, you know whether there are any claims, and if so, whether the claims are sound, know what your insurance rates actually have been, your ocean transportation, all those items.

Mr. Murray: If Your Honor please, I will have to ask that counsel does not lead this witness quite that much. It amounts almost to testimony by him.

The Court: I think counsel will agree he is leading the witness.

Mr. Wallace: Yes, I would.

(Testimony of C. D. Hudson.)

By Mr. Wallace:

Q. Will you state to us, Mr. Hudson, please, why there is a period of several months between the establishment of your preliminary, or preliminary price and the final determination of the final ultimate return from a particular shipment?

A. Yes. We enter into a contract with our customer, covering possibly a total given number of box shook to be delivered over a period which may vary from three months up to nine months. The variable factors there may be rail freight to port, port charges, handling charges. And sometimes, in certain items of insurance, ocean freight, and of course [46] claims.

Under wartime conditions we attempt to freeze as many of these factors as possible. Some of them are fixed subject to variations which will be to the customer's account, but there is no way at all—we have never found any way to freeze all the hazards and factors of expense.

As an illustration, under present conditions we ship entirely from New York. We start the shipments east, thinking that we have ocean space arranged, and when the shipments are half way there, the government takes the space away from us. We must have at all times warehouse space available at some point in the east. Therefore we must start this shipment out on a warehousing and transit basis.

We have even had the government take warehouses away from us while shipments were in tran-

(Testimony of C. D. Hudson.)

sit. We have had warehouse space at Newark, at Trenton, Jersey City, I believe sometimes at Baltimore. The hope is that we will be able to unload cars directly into the vessel, but very often we will have to unload them into a warehouse. Then we have even had cars and shipments made on barges, taken out into the New York harbor, pulled alongside vessels, and in the process, or before a bundle of box shook has been moved, the ship has been taken away from us. We have had to move those shipments back into a warehouse. Every handling involves breaking of bundles and additional expense, and those items as they pile up of course [47] must be taken care of somewhere with our customers, eight, ten thousand miles away. We must assume full responsibility to get the load on and to surmount all of those difficulties and obstacles.

Now, conditions at the beginning of a deal may be greatly different from those at the end. I refer as an example—I would say that if we are handling a million box shook in June, the conditions might be quite favorable to production. Dry material is available. It may be June or July, and we have ideal conditions.

When we get into the latter part of the year, November, December, we may have difficulties that we never anticipated during the summer months, so we don't know until the whole shipment is completed just what our expenses will be. Then, two months later we may get a cable from South Africa

(Testimony of C. D. Hudson.)

indicating that at some interior point they are finding that mold has developed, certain shipments were apparently too damp. These shipments crossed the Equator. We sometimes find that the holds of vessels are in condition where considerable condensation occurs, seepage or dripping of water on this shipment. Perhaps the moisture content has been no higher than 18 per cent, what we attempt to achieve at time of shipment, but en route there is a considerable condensation in the hold. That is a very familiar complaint, and so, at destination, we don't know whether it has been our fault or [48] the fault of conditions beyond our control.

At any rate, claims develop, cables come in, merely warning us that a claim is developing. Three months later we may know what that claim is. Six months later we may get word that the claim never amounted to anything, as has happened, and then again six months later we have had bad news.

Q. You referred in your answer to a minimum understanding with your members on the preliminary sale price. Does that understanding with your members with respect to each sales contract apply to all the sales contracts? A. Yes.

Q. Was that understanding reduced to simple written form?

A. No, not necessarily. I think that our minutes will show—carry some statements of policy, but in the main this relationship between myself and the mills has been a personal one, handled by personal calls. I have, since 1935, made usually three to

(Testimony of C. D. Hudson.)

eight trips to the West Coast annually. I have tried to keep rather closely in touch with these mills. Frequently the principals of these concerns are in the East, and they usually call on me there in Washington when they are in that vicinity. Then we use long distance telephone quite often. This is an understanding that has grown up from the inception of the organization. [49]

My proposal to members of this industry when we set up the organization in 1935 was that this would be a service organization, actually just an export department of their own firms. There would be no profits accrue. It would be operated merely on the basis of meeting its own expenses so far as possible during the first thirty months of the organization.

Mr. Murray: May I interrupt?

If Your Honor please, I will ask that this go in by question and answer now, instead of narrative, because it is getting to the point where I want to object, and I have difficulty doing so in a narration. I ask that this be done, please, so I can protect myself on the record.

The Court: If you will conform to that practice.

Mr. Wallace: Yes, Your Honor.

By Mr. Wallace:

Q. Mr. Hudson, who prepares the minutes of the American Box Shook Export Association?

A. I have done so in all cases where I have been present at the meetings, and that covers possibly 90 per cent.

(Testimony of C. D. Hudson.)

Q. And you then have them mimeographed?

A. That's right.

Q. What is the purpose of the mimeographing?

A. We send a copy of the minutes to all members.

Q. I hand you a book here and ask you if you will look [50] at it and tell us what it is?

(Handing.)

A. Well, this is a file of the minutes of the American Box Shook Export Association, including, I believe, notices of meetings and possibly some other similar material.

Q. Is that a book that you keep?

A. This comes from our files in Washington.

Q. It is kept under your direction?

A. Yes.

Q. I call your attention to the minutes of the meeting held on May 6, 1940, and ask you if those minutes were prepared by you?

A. Yes, they were.

Q. Were they sent around to all the members?

A. Yes.

Q. I call your attention to one item appearing on the second page of the minutes of the meeting of May 6, 1940, and ask if you will read the last paragraph?

Mr. Murray: May I see that?

Mr. Wallace: Surely. (Handing).

By Mr. Wallace:

Q. Will you read it for the record?

(Testimony of C. D. Hudson.)

A. "Mr. Gordon moved that the by-laws be amended to effect distribution of excess revenue among members on a basis of f.o.b. dollar mill value participation in shipments, rather than as a dividend on stock, such distribution to be [51] made annually as of December 31. Mr. McCulloch seconded the motion, and it was duly enacted."

Q. Were Mr. Gordon and Mr. McCulloch both directors and members at that time, or representatives and members? A. They were.

Q. Mr. Hudson, I hand you another book and ask you if the first pages of this book contain the by-laws and the articles of incorporation of the American Box Shook Association?

A. They do.

Q. On Page 10 of the volume I call your attention to article 18 of the by-laws and ask if you will please read that into the record?

A. "The board of directors of this corporation may adopt, repeal and/or amend the by-laws of this corporation, subject to the power of the shareholders to adopt, amend or repeal such by-laws, or to revoke and/or reinstate such authority by the vote of the shareholders or by the written assent of shareholders, provided, however, that the board of directors of this corporation shall have no authority to change the number of directors or the provisions with reference to the filling of vacancies in the board of directors, as provided in Article 6 hereof."

Q. I hand you the volume you have described as the record of the minutes of meetings of the Peti-

(Testimony of C. D. Hudson.)

tioner Association [52] and ask you to turn to the minutes of July 29th, and ask you if those minutes were prepared by you? A. Yes, they were.

Q. Mr. Hudson, have you an extra copy of the minutes of the meeting of July 29, 1940?

A. I believe in our files here we would have, but I don't know as we have them here.

Mr. Wallace: Do you know, Mr. Muncy? Have we an extra copy?

Mr. Muncy: I will check; I believe so.

Mr. Wallace: Well, if you will just identify that, then instead of having the witness read the portion I had in mind, counsel, I will follow your suggestion and just put in a copy, if I may, Your Honor.

The Witness: Yes, the meetings—the minutes of the meeting of July 29, 1940, were prepared by myself.

Mr. Wallace: I will put in the whole minutes, counsel. I will ask the witness to read the paragraph at the bottom of the first page.

The Witness: "Attention was further called to the fact that the Associaion had been set up as a non-profit organization, with the understanding that any excess received from the sale of shook over expenses would, upon action of the organization, be subject to distribution as additional realization on shipments made during the period when such [53] surplus was accumulated."

Mr. Wallace: Mr. Murray, I think these are duplicate mimeographs, but you might check, and

(Testimony of C. D. Hudson.)

if they seem to be correct, we will put them in evidence.

Mr. Hudson, I call your attention to the fact, which counsel has called my attention to, that the heading of this document or mimeographed document says, "Minutes of the meeting of American Box Shook Export Association, Unincorporated, held at the offices of the Western Box Distributors, San Francisco, California, Monday, July 29, 1940."

I will offer that in evidence as the Petitioner's Exhibit No. 1.

Mr. Murray: I object to that, if Your Honor please, on the basis that it is incompetent, irrelevant and immaterial, being the minute of the unincorporated Association which existed prior to the existence of this incorporation, and it has no bearing on this case.

Mr. Wallace: It is not offered, if Your Honor please, for the purpose either of proving it as a minute, or for the purpose of proving the minutes. The witness has testified previously to an understanding between himself, or the Association and its members with respect of contracts for the sale of lumber. I had asked the witness if those contracts or that understanding had anywhere been reduced to writing. Having identified the documents, I was then going to ask the [54] witness as to whether those statements which he has read were a writing evidencing this understanding.

The Court: It will be admitted. Exhibit 1.

(The document referred to was marked and

(Testimony of C. D. Hudson.)

received in evidence as Petitioner's Exhibit No. 1.)

PETITIONER'S EXHIBIT No. 1

National Wooden Box Association
308 Barr Building, Washington, D. C.

MINUTES OF MEETING

of

AMERICAN BOX SHOOK EXPORT ASSOCIATION (Unincorporated)

Held at Offices of Western Box Distributors, San Francisco, Calif. Monday, July 29th, 1940

Present:

Albert Pearlman, American Box Corporation.
J. F. O'Brien, California Pine Box Distributors.
A. W. Pinger, California Pine Box Distributors.
A. H. Gordon, Clover Valley Lumber Company.
J. Walter Rodgers, Western Box Distributors.
Walter Slack, Counsel.
Rollin Rodolph, Accountant.
W. A. Clayton, American Box Shook Export Association.
C. D. Hudson, American Box Shook Export Association.

Mr. Rodgers, president of the Association, called the meeting to order. An announcement was made that Mr. Rodgers and Mr. O'Brien, secretary, had received proxies from the following members:

E. H. Barnes Company.
New England Box Company.

(Testimony of C. D. Hudson.)

Kesterson Lumber Corporation.
Western Pine Mfg. Co., Ltd.
Weyerhaeuser Sales Company.
White Pine Sash Company.
Brewer Pine Box Company.

It was stated the proxies carried instructions that the Association's surplus be made available for use of the incorporated association.

The manager of the Association called attention to the audit as of May 31, 1940, which showed a surplus in the amount of $8,942.91. The manager stated a letter had been addressed to the Commissioner of Internal Revenue asking whether any surplus held by the Association upon dissolution was subject to tax.

Attention was further called to the fact that the Association had been set up as a non-profit organization with the understanding that any excess received from the sale of shook over expenses would, upon action of the organization, be subject to distribution as additional realization on shipments made during the period when such surplus was accumulated.

It was stated the surplus as of May 31 had been accumulated during the period from March 1st to May 31st, during which time the Association shipped a total of 8,204,963 ft., purchased from seven members in the following amounts and percentages:

(Testimony of C. D. Hudson.)

	March-April	May	Total	Percent.
American Box Corporation	987,631	1,342,304	2,329,935	28.40
Brewer Pine Box Company	317,808	206,800	524,608	6.39
California Pine Box Dist.	554,400	1,123,800	1,678,200	20.45
Dwight Lumber & Box Co.	99,000	802,500	901,500	10.99
Western Box Distributors	682,920	1,143,600	1,826,520	22.26
Western Pine Mfg. Co., Ltd.	277,200	169,000	446,200	5.44
Weyerhaeuser Sales Company	297,000	201,000	498,000	6.07
	3,215,959	4,989,004	8,204,963	100.00

The following resolution was then submitted:

Whereas, the American Box Shook Export Association was organized as a non-profit association for the purpose of conducting export trade at cost in behalf of its members, and

Whereas, the financial report of the Association as of May 31, 1940, shows a surplus in the amount of $8,942.91, therefore, be it

Resolved: That the invoiced mill value of shipments made from March 1st to May 31, 1940, be increased to the extent of $1.00 per M, said increase to be evidenced by invoices submitted by respective members covering all shipments during the period named, and

Whereas, the American Box Shook Export Association has voted to change its status as of June 1, 1940 to that of a corporation, and

Whereas, the incorporated association may require temporarily the use of cash funds in excess of its fixed capital, be it further

Resolved: That the respective amounts due members for additional invoice value applic-

(Testimony of C. D. Hudson.)

able to shipments from March 1st to May 31st be placed in the hands of C. D. Hudson as trustee, and that said C. D. Hudson be authorized to allow the American Box Shook Export Association (incorporated) to use such funds at no interest charge until the said incorporated Association has accumulated a surplus above expenses in an amount equal or approximately equal to such funds.

Affirmative votes for the foregoing resolutions were cast in behalf of the following members:

American Box Corporation
California Pine Box Distributors
Kesterson Lumber Corporation
Clover Valley Lumber Company

Holders of proxies felt they could not cast votes in favor of the resolution without violation of instructions. The following motion was then duly presented and enacted:

Moved, that the above resolution be placed before the membership of the American Box Shook Export Association (unincorporated) by mail ballot.

C. D. HUDSON

Mr. Murray: May I place another exception on the record, if Your Honor please? I also object to this on the basis that this taxpayer corporation could in no way be bound by an agreement between

(Testimony of C. D. Hudson.)

someone who was handling their business for them and some of their members, and for that reason this document is incompetent. I don't know the reason that counsel had in mind, but he just stated that he is trying to prove by some agreement that this witness had with a prior organization, they are going to try to prove something that he feels might bind this corporation, which I submit is incompetent evidence.

The Court: Proceed.

Mr. Murray: May I have an exception, please?

By Mr. Wallace:

Q. Mr. Hudson, do either of the statements you have read reflect the understanding you have just testified to?

Mr. Murray: I object on the basis that is incompetent, irrelevant and immaterial to this case.

The Court: Objection overruled.

Mr. Murray: Exception, please. [55]

A. The second statement reflects the understanding we have had and do have at the present time with our members.

Q. Under the date of July 29, 1940, or previous thereto, or when?

Mr. Murray: Same objection, if Your Honor please.

The Court: Objection overruled.

Mr. Murray: Exception, please.

A. It accurately reflects the understanding I have had from the very beginning of this project, whether unincorporated or incorporated.

(Testimony of C. D. Hudson.)

Q. I call your attention, Mr. Hudson, to the fact that in the reference made in the minutes of May 6, 1940, a reference is made to an f.o.b. dollar mill valuation, and in the later reference made in the minutes of July 29th, a reference is made to an additional realization on shipments made. Is there a difference between those two?

A. There is, yes.

Q. Will you explain what the difference is?

A. Well, one was to provide for the final payment based upon dollar of shipments of respective members, and the other based upon footage shipped.

The motion to amend the by-laws, as presented by Mr. Gordon, represented an effort to formally put into our by-laws a procedure or a method of final settlement, and at [56] that time apparently it was thought that dollar value of shipment would be the right basis of computing the additional realization. It was not, however, very well conceived at the moment, we found, because that was not the method we had used previously, and it was not entirely a fair method. We sold everything on the per thousand foot basis, that is, we computed everything. We actually sell the customer on a unit basis per box, but in dealing with our own members all of our conversations were based more or less upon realization per thousand board feet, and we made all computations of costs on that basis, and so, when it came to the matter of actually distributing the residue from a certain transaction over a given period, it was quite apparently the only fair method

(Testimony of C. D. Hudson.)

of distribution, was to put it on a per-thousand-foot basis.

Q. Per thousand feet of what?

A. Box shook, computed according to our standard method of figuring the footage in box shook.

Q. What was the relationship between a mill, or a member, and the per thousand feet?

A. Well, if one member shipped a half a million feet during a given period, and we found that our realization was approximately $2 a thousand more than the minimum price, then that member would be entitled to $1 per thousand on 500,000 feet.

Q. Per thousand feet of lumber shipped? [57]

A. Of box shook, yes. Another member, shipping only 100,000 feet would be entitled to $1 per thousand on 100,000 feet.

Q. Mr. Hudson, did you or the American Box Shook Export Association make a distribution of the additional funds realized from shipments on or about May 28, 1941? A. Yes, we did.

Mr. Wallace: I have handed counsel the checks, Your Honor, that were used to distribute.

By Mr. Wallace:

Q. Mr. Hudson, I hand you a list of cancelled checks, together——

The Court (Interposing): A list or a group?

Q. (Continuing): ——a group of cancelled checks, all made out on the check form of the American Box Shook Export Association.

Will you look through those checks and tell me if those are the checks that were sent out by your

(Testimony of C. D. Hudson.)

Association to certain of its members on or about May 28, 1941? A. They are.

Q. And to whom were those checks sent?

You want them listed for the record, I take it.

A. And the amounts?

Q. Will you give us the list and the amounts?

A. Western Pine Manufacturing Company, $989.68. [58]

Ewauna Box Company, $214.68.

White Lumber & Box Company, $285.30.

Western Box Distributors, $1,077.17.

Kesterson Lumber Corporation, $120.03.

California Pine Box Distributors, $704.11.

American Box Corporation, $1,804.27.

New England Box Company, $800.87.

E. H. Barnes Company, $498.34.

White Pine Sash Company, $572.49.

Brewer Pine Box Company, $492.17.

Q. You have read them all? A. I have.

Q. Attached to the group of checks there is a letter addressed by the American Box Shook Export Association to one of its members. Will you read that letter, please?

A. "May 28, 1941.

"Western Box Distributors,
"403 Monadnock Building,
"San Francisco.

"Gentlemen:

"We are attaching our check for $1,077.17, covering additional realization on shipments made by

(Testimony of C. D. Hudson.)

your mills between June 1, 1940, and June 1, 1941.

"Our records indicate that during this [59] period your mills shipped 2,154,334 board feet of box shook, against which shipments the management authorized additional realization to you of $.50 per thousand board feet.

"Signed: AMERICAN BOX SHOOK EXPORT ASSOCIATION,
By W. A. CLAYTON."

Q. Did a letter similar to the letter you have in your hand, and which you have just read for the record, go to each of the other members of your Association who received checks? A. Yes.

Q. I noticed that in your list of members given in your testimony a little time ago, you referred also to the Weyerhaeuser Sales Company, and I noticed that none of those checks is made to the Weyerhaeuser Sales Company.

Was a check sent to the Weyerhaeuser Sales Company? A. No.

Q. Why not?

A. They made no shipments during this period.

Q. Did each of the persons or the corporations to whom you sent those checks, have they made agreements with you on the minimum or preliminary basis you have referred to, and made sales to your corporation on that basis prior to the [60] issuance of those checks? A. Yes.

Mr. Murray: Object, if Your Honor please, on the basis that is incompetent, irrelevant and immaterial.

(Testimony of C. D. Hudson.)

The Court: Objection overruled.

Mr. Murray: Exception.

By Mr. Wallace:

Q. Did the letters which went out to the other members all have the same form of calculation?

A. Yes, yes, 50 cents per thousand board feet.

Q. How did you arrive at that sum of 50 cents per thousand board feet?

A. We found we had received additional realization, a total of which represented—rather, the total of which that we felt might be distributed safely without hazard—or without depleting our reserve for additional cost would represent 50 cents a thousand board feet.

Q. Therefore you sent the checks to each of the persons who had made sales during that period?

A. Made shipments during that period.

Mr. Wallace: I should like to introduce the group of checks, Your Honor, and the letter accompanying them.

The Court: As one exhibit?

Mr. Wallace: As one exhibit.

Mr. Murray: No objection. [61]

The Court: Exhibit 2.

(The documents referred to were marked and received in evidence as Petitioner's Exhibit No. 2.)

By Mr. Wallace:

Q. Now, Mr. Hudson, was the same plan of operation to which you have testified, the same ar-

(Testimony of C. D. Hudson.)

rangement with your members carried on throughout the fiscal year June 1, 1940 to May 31, 1941?

A. Yes.

Q. And have you continued to operate under that plan since? A. We have.

Mr. Wallace: That is all.

Cross-Examination

By Mr. Murray:

Q. Mr. Hudson, are you a stockholder of this American Box Shook Association?

A. No, I am not.

Q. Are you a director? A. No, I am not.

Q. Are you an officer? A. Manager only.

Q. Manager only? A. Yes.

Q. How did it come you were making minutes for the [62] corporation?

A. I think, Mr. Murray, that may have been somewhat irregular. Those minutes should later be approved by the officially elected secretary and president. I think maybe the reason I made out the minutes was that it had been a one-man organization largely from the first, and I have always taken care of such details as that.

Q. Well, the minute dated May 6, 1940, from which you read a paragraph into the record is signed by yourself, but there is no evidence in the minutes that it was approved by anybody. What do you say about that?

A. Well, I would say that we generally have operated perhaps with a minimum of formality and office staff, and since I sent copies of the minutes

(Testimony of C. D. Hudson.)

to everybody concerned and always have sent copies, there apparently has been no objection to that informal method of handling it. I presume, to bring the matter into strictly legal status, we should have those minutes reviewed by whoever was actually the secretary at the time, and have him sign the minutes.

I noticed one set of minutes carries my name as acting secretary. Usually I see my name in there without any title.

Q. Well, then, you felt that you had the authority to draw a minute any time you wanted to, and just send a copy out to the directors? [63]

A. Only based upon actions taken at a regularly called meeting.

Q. Isn't it true that you wrote up some minutes in Washington and sent them out to them at times?

A. Only based upon meetings held.

Q. Held where?

A. Held here, or wherever the minutes state. So far as I know, we have never held a meeting any other place than in San Francisco, as far as I can recall. Frequently I have taken a plane within an hour after a meeting was held, and would be in Washington the next day or two, and we would write the minutes in Washington, based entirely upon a meeting held here.

Mr. Murray: I would like to offer as Respondent's first exhibit the corporation income declared value excess profits and defense tax return, and

(Testimony of C. D. Hudson.)

the corporation excess profits tax return, to which is attached a document, "Treasury Form 1028," called, "Questionnaire with respect to claim for exemption from tax," all of which are bound together here and refer to the fiscal year now before the Court, the fiscal year of the corporation ended May 31, 1941.

Mr. Wallace: May I see it, counsel, please?

The Court: Is there any objection?

Mr. Wallace: No objection, Your Honor.

The Court: Exhibit A. [64]

(The document referred to was marked and received in evidence as Respondent's Exhibit "A".)

Form 1120
Treasury Department
Internal Revenue Service

(Auditor's stamp)

UNITED STATES CORPORATION INCOME, DECLARED VALUE EXCESS-PROFITS, AND DEFENSE TAX RETURN

Page 1

1940

For Calendar Year 1940

AUG 1941

or fiscal year beginning June 1, 1940, and ended May 31, 1941

File No. 37

Ref. No. 410041

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

TOTAL INCOME, DECLARED VALUE EXCESS-PROFITS, AND DEFENSE TAXES

37. Total income and income defense taxes (line 35, page 2)	$ 2,114 92		
38. Less: Credit for income taxes paid to a foreign country or United States possession allowed a domestic corporation. (See Instruction 37)			
39. Balance of income and income defense taxes		$ 2,114 92	
40. Total declared value excess-profits and declared value excess-profits defense taxes (line 10, page 2)			
41. Total income, declared value excess-profits, and defense taxes due		$ 2,114 92	

AFFIDAVIT. (See Instruction 5)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

Subscribed and sworn to before me this 14th day of August, 1941

NOTARIAL SEAL

Matilda J. Schimpf
(Signature of officer administering oath) (Title)

CORPORATE SEAL

(President, principal officer) (State title)

(Treasurer, Assistant Treasurer, or chief accounting officer) (State title)

AFFIDAVIT. (See Instruction 5)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 11th day of August, 1941

NOTARIAL SEAL

Caroline E. Simpson
(Signature of officer administering oath) (Title)

(Signature of person preparing the return)

(Signature of person preparing the return)

(Name of firm or employer, if any)

NOTE.—In order that this return may be accepted as meeting the requirements of the Internal Revenue Code, the data called for herein must be set forth FULLY and CLEARLY.

16—8000

Form 1120
Treasury Department
Internal Revenue Service

UNITED STATES CORPORATION INCOME, DECLARED VALUE EXCESS-PROFITS, AND DEFENSE TAX RETURN

1940

AUG 1941

For Calendar Year 1940

or fiscal year beginning June 1, 1940, and ended May 31, 1941

No. 37
Serial 410041
Date
Form 1120

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

AMERICAN BOX SHOOK EXPORT ASSOCIATION
407 CROCKER BUILDING
SAN FRANCISCO CALIFORNIA

Kind of business: Exporting for members under the Webb-Pomerene Act.

Business page and number (See instruction 9): Exporting of lumber products

Code Classes No. of Form Returned

Employer's name

Employer's address

Location

Collector's stamp

A

NORMAL-TAX NET INCOME COMPUTATION

Item No.	GROSS INCOME		
1.	Gross sales (where inventories are an income-determining factor) $; Less: Returns and allowances $		
2.	Less: Cost of goods sold. (From Schedule A)		
3.	Gross profit from sales		
4.	Gross receipts (where inventories are not an income-determining factor) $		
5.	Less: Cost of operations. (From Schedule B)		
6.	Gross profit where inventories are not an income-determining factor schedule attached	50,576	02
7.	Interest on loans, notes, mortgages, bonds, bank deposits, etc. (See Instruction 17-(1))		
8.	Interest on obligations of the United States. (From Schedule M, line 15 (c) (4).) (See Instruction 17-(2))		
9.	Rents. (See Instruction 18)		
10.	Royalties. (See Instruction 19)		
11.	(a) Net short-term capital gain. (From Schedule C)		
	(b) Net long-term capital gain (or loss). (From Schedule C)		
	(c) Net gain (or loss) from sale or exchange of property other than capital assets. (From Schedule D)		
12.	Dividends. (From Schedule E)		
13.	Other income. (State nature) Discounts	88	71
14.	Total income in items 6, and 8 to 13, inclusive		$ 50,664 73
	DEDUCTIONS		
15.	Compensation of officers. (From Schedule F)	18,000	00
16.	Salaries and wages (not deducted elsewhere)	1,852	78
17.	Rent. (See Instruction 21)		
18.	Repairs. (See Instruction 22)		
19.	Bad debts. (From Schedule G)		
20.	Interest. (See Instruction 24)		
21.	Taxes. (From Schedule H.) (Report declared value excess-profits tax as item 31)	814	48
22.	Contributions or gifts paid. (From Schedule I)		
23.	Losses by fire, storm, shipwreck, or other casualty, or theft. (Submit schedule; see Instruction 27)		
24.	Depreciation. (From Schedule J)	167	96
25.	Depletion of mines, oil and gas wells, timber, etc. (Submit schedule; see Instruction 28)		
26.	Net operating loss deduction. (Submit statement; see Instruction 29)		
27.	Amortization. (Submit schedule; see Instruction 31)		
28.	Other deductions authorized by law. (From Schedule K) attached	14,794	82
29.	Total deductions in items 15 to 28, inclusive		$ 37,347 57
30.	Net income for declared value excess-profits tax computation (item 14 minus item 29)		$ 13,317 16
31.	Less: Declared value excess-profits tax. (See Instruction 32)		$ 13,317 16
32.	Net income		$
33.	Less: Interest on obligations of the United States (item 8, above)		$
34.	Adjusted net income		$ 13,317 16
35.	Less: Dividends received credit (85 percent of column 3, Schedule E, but not in excess of 85 percent of item 34, above)		
36.	Normal-tax net income		

TOTAL INCOME, DECLARED VALUE EXCESS-PROFITS, AND DEFENSE TAXES

37.	Total income and income defense taxes (line 30, page 2)	$ 2,114	92
38.	Less: Credit for income taxes paid to a foreign country or United States possession allowed a domestic corporation. (See Instruction 37)		
39.	Balance of income and income defense taxes		$ 2,114 92
40.	Total declared value excess-profits and declared value excess-profits defense taxes (line 10, page 2)		$
41.	Total income, declared value excess-profits, and defense taxes due		$ 2,114 92

AFFIDAVIT. (See Instruction 5)

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself (herself) and says that the return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

Subscribed and sworn to before me this 14th day of August, 1941

CORPORATE SEAL

Matilda J. Schimpf
(Signature of officer administering oath)

J. H. Moran
(President, vice president, or other principal officer) (Corporate title)

J. H. Moran
(Treasurer, assistant treasurer, or chief accounting officer)
(Corporate title)

NOTARIAL SEAL

AFFIDAVIT. (See Instruction 5)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 14th day of August, 1941

(Signature of person preparing the return)

(Signature of person preparing the return)

NOTARIAL SEAL

Matilda J. Schimpf
(Signature of officer administering oath)

(Title)

(Name of firm or employer, if any)

NOTE.—In order that this return may be computed in meeting the requirements of the Internal Revenue Code, the data called for herein must be set forth FULLY and CLEARLY.

16—35635

Page 2

DECLARED VALUE EXCESS-PROFITS AND DECLARED VALUE EXCESS-PROFITS CREDIT TAX COMPUTATION. (See Instructions 24)

	Column 1	Rate %	Column 2 Amount of Tax
1. Net income for declared value excess-profits tax computation (Item 26, page 1)	$ 13,217 66		
2. Value of capital stock as declared in your capital stock tax return for the year ended June 30, 1940 (or for your ended June 30, 1941, if your income tax fiscal year began in 1940 and ended on or after July 31, 1941)	$ 300,000.00		
3. 10 percent of line 2	$ 30,000 00		
4. Dividends paid during the fiscal year (the amount of column 3, Schedule E, page 3) in excess of 10 percent of Item 24, page 1)	30,000 00		
5. Balance subject to declared value excess-profits tax (line 1 minus total of lines 3 and 4)	$ None		
6. Amount taxable at 5 percent (5 percent of line 5, but not more than line 3); and tax	$	5%	$
7. Balance taxable at 25 percent (line 5 minus line 6, column 2); and tax	$	25%	$
8. Total declared value excess-profits tax (total of line 6, column 2, and line 7, column 2)			$
9. Declared value excess-profits credit (10 percent of line 2)			
10. Total declared value excess-profits and declared value excess-profits credit taxes			$ None

INCOME AND INCOME DEFENSE TAX COMPUTATION. (See Instructions 25 and 26)

CORPORATIONS HAVING NO NET INCOME OR NOT MORE THAN FIVE THOUSAND DOLLARS.

11. Normal-tax net income (Item 26, page 1)	$ 13,217 66		
12. Portion of line 11 (not in excess of $25,000); and tax on 22.5 percent	$ 5,000 00	22.5%	$ 870 00
13. Portion of line 11 (in excess of $25,000 and not in excess of $50,000); and tax on 15 percent	8,217 66	15%	1,247 68
14. Portion of line 11 (in excess of $50,000); and tax on 17 percent		17%	
15. Total income tax (total tax in column 2 of lines 12, 13, and 14)			$ 1,822 68
16. Income defense tax (10 percent of line 10)			$ 182 27

CORPORATIONS HAVING NET INCOME OF MORE THAN FIVE THOUSAND DOLLARS.

17. Normal-tax net income (Item 26, page 1)	$		
18. Portion of line 17 in the amount of $25,000; and tax	$ 25,000 00	24%	$ 23,775 00
19. Portion of line 17 (in excess of $25,000); and tax at 25 percent			
20. Total income tax (total tax in columns 2 of lines 18 and 19)			$
21. Income defense tax:			
(a) If line 17 is less than $31,304.30 ($977.20 plus 3.5 percent of line 18, column 2)			$
(b) If line 17 is $31,304.30 or more (1.0 percent of line 17)			$

CORPORATIONS HAVING NET INCOME BUT NO NORMAL-TAX NET INCOME. (See Instruction 25-(2))

22. Normal-tax net income (Item 26, page 1)	$		
23. Surtax net income (22.1 percent of line 22)		22.1%	$
24. Income defense tax (1.0 percent of line 22)			$

CERTAIN CLASSES OF CORPORATIONS NOT SUBJECT TO EXCESS-PROFITS TAX. (See Instruction 25)

(1) Foreign Corporations Engaged in Business Within United States. (See Instruction 25-(2))

25. Normal-tax net income (Item 26, page 1)	$		
26. Surtax net income (22.1 percent of line 25)		22.1%	$
27. Income defense tax (1.0 percent of line 25)			$

(2) Mutual Investment Companies. (See Instruction 25-(3))

28. Adjusted net income (not including net operating loss deduction) (Item 26, page 1, plus line 29, page 1)	$		
29. Less: Basic surtax credit. (Submit schedule)	$		
30. Balance subject to income tax			
31. Surtax net (22.1 percent of line 30)		22.1%	$
32. Income defense tax (1.0 percent of line 30)			$
33. Total income tax (line 15, 20, 23, 24, or 32, above, whichever is applicable)			$ 1,822 68
34. Total income defense tax (line 16, 21(a), 21(b), 24, 27, or 32, above, whichever is applicable)			182 27
35. Total income and income defense taxes			$ 2,114 95

Schedule A—COST OF GOODS SOLD. (See Instruction 16)

(Where inventories are an income-determining factor)

Inventory at beginning of year	$		
Material or merchandise bought for manufacture or sale			
Salaries and wages			
Other costs per books. (Attach itemized schedule)			
Total	$		
Less: Inventory at end of year			
Cost of goods sold (enter as item 2, page 1)	$		

Schedule B—COST OF OPERATIONS

(Where inventories are not an income-determining factor)

Salaries and wages	$		
Other costs (to be detailed):			
(a)			
(b)			
(c)			
(d)			
(e)			
Total (enter as item 2, page 1)	$		

Schedule C—CAPITAL GAINS AND LOSSES. (See Instruction 27)

1. Description of Property	2. Date Acquired	3. Gross Sales Price (Contract price)	4. Cost or Other Basis	5. Depreciation of Sale and Cost of Improvements subsequent to acquisition or March 1, 1913	6. Depreciation Allowed (or allowable) from acquisition or March 1, 1913 (Column 5 minus 6)	7. Gain or Loss (column 3 plus column 6 minus the sum of columns 4 and 5)
SHORT-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR NOT MORE THAN 18 MONTHS						
		$	$	$	$	$
Total net short-term capital gain (or loss). (Enter on Item 11 (c), page 1, amount of gain. No net loss allowable)						$
LONG-TERM CAPITAL GAINS AND LOSSES—ASSETS HELD FOR MORE THAN 18 MONTHS						
		$	$	$	$	$
Total net long-term capital gain (or loss). (Enter on Item 11(b), page 1)						$

Schedule D—GAINS AND LOSSES FROM SALES OR EXCHANGES OF PROPERTY OTHER THAN CAPITAL ASSETS. (See Instruction 28)

1. Description of Property	2. Date Acquired	3. Gross Sales Price (Contract price)	4. Cost or Other Basis	5. Depreciation of Sale and Cost of Improvements subsequent to acquisition or March 1, 1913	6. Depreciation Allowed (or allowable) from acquisition or March 1, 1913 (Column 5 minus 6)	7. Gain or Loss (column 3 plus column 6 minus the sum of columns 4 and 5)
		$	$	$	$	$
Total net gain (or loss). (Enter on Item 11 (d), page 1)						$

Supplemental Information required for Schedules C and D

State with respect to each item of property reported in Schedules C and D: (1) how property was acquired ____; (2) whether at time of sale or exchange (a) purchaser owned directly or indirectly more than 50 percent in value of your outstanding stock, (b) where 50 percent or less than 50 percent in value of its capital stock and 50 percent in value of your capital stock was owned directly or indirectly by you the same individual or his family, and (c) where purchaser was a corporation, whether more than 50 percent in value of its capital stock was owned directly or indirectly by you ____. If so, state name and address of purchaser ____

AH-2

Schedule E.—INCOME FROM DIVIDENDS

1. Name and Address of Paying Corporation	2. *Domestic Corporations Taxable under Chapter 1, Internal Revenue Code	3. Foreign Corporations	4. Other Corporations
	$	$	$
Totals	$	$	$
Total of columns 2, 3, and 4 (Enter as Item 12, page 1)			$

*Exempt dividends received from corporations organized under the China Trade Act, 1922, and corporations entitled to the benefits of section 251 of the Internal Revenue Code, which dividends should be entered in column 4.

Schedule F.—COMPENSATION OF OFFICERS

1. Name and Address of Officer	2. Official Title	3. Time Devoted to Business	Percentage of Corporation's Stock Owned		5. Amount of Compensation
			4. Common	5. Preferred	
					$
Total compensation of officers. (Enter as Item 15, page 1)					$

NOTE.—Schedule F-1 (IN DUPLICATE) also must be filed with this return if compensation in excess of $75,000 was paid to any officer or employee.

Schedule C.—BAD DEBTS. (See instruction 23) (See note 1)

1. Taxable Year	2. Net Income Reported	3. Gain on Account	4. Bad Debts Charged Off by Corporation if No Reserve is Carried on Books. (See note 2)	If Corporation Carries a Reserve—	
				5. Gross Amount Added to Reserve	6. Amount Charged Against Reserve
1936	$	$	$	$	$
1937					
1938. (See note 2)					
1939. (See note 2)					
1940. (See note 2)					

1. Check whether deduction claimed represents worthless debts charged off ☐, or is an addition to a reserve ☐.

2. Not including securities which are capital assets ascertained to be worthless and charged off within the taxable year. Such securities charged off within the year covered by this return should be reported in Schedule C.

Schedule H.—TAXES. (See Instruction 25)

Nature	Amount
Unemployment taxes	$ 583 16
Federal Old Age	197 91
Personal Property - Calif.	29 12
Personal Property - Wash. D. C.	4 24
Total. (Enter as Item 21, page 1)	$ 814 43

Schedule I.—CONTRIBUTIONS OR GIFTS PAID. (See Instruction 26)

Name and Address of Organization	Amount
	$
Total. (Enter as Item 22, page 1, subject to 5 percent limitation). (See Instruction 26)	$

Schedule J.—DEPRECIATION. (See Instruction 28)

1. Kind of Property (If buildings, state material of which constructed)	2. Date Acquired	3. Cost or Other Basis (Do not include land or other nondepreciable property)	4. Assets Fully Depreciated in 1 or at End of Year	5. Depreciation Allowed (or allowable) in Prior Years	6. Remaining Cost or Other Basis to be Recovered	7. Estimated Life Used in Computing Depreciation	8. Estimated Remaining Life From Beginning of Year	9. Depreciation Allowable This Year
Moisture Meter	3-31-41	$ 97 34	$	$	$ 97 34	8	8	$ 3 25
Furniture & Fixtures	6-31-41	1,361 42		31 80	1,329 92	10	10	132 99
Furniture & Fixtures	1940 & 1941	739 37			739 37	10	10	31 64
		2,198 13			2,166 63			
Total. (Enter as Item 24, page 1)								$ 167 88

Schedule K.—OTHER DEDUCTIONS. (See Instruction 27)

QUESTIONS

1. Date of incorporation March 26, 1940
2. State or country California
3. State collector's office where the corporation's return for the preceding year was filed
4. The corporation's books are in care of Association

   Located at Crocker Building, San Francisco
5. Number of places of business two
6. Was the corporation during the taxable year engaged in the production of facilities for national defense through Government contracts or subcontracts? No
7. Is the corporation a personal holding company within the meaning of section 501 of the Internal Revenue Code? No (If so, an additional return on Form 1120 H must be filed.)
8. Is this a consolidated return of railroad corporations or Pan-American trade corporations? No (If so, procure from the collector of internal revenue for your district Form 851, Affiliations Schedule, which shall be filed in, sworn to, and filed as a part of this return.)
9. If this is not a consolidated return of railroad corporations or Pan-American trade corporations, (a) did you own at any time during the taxable year 50 percent or more of the voting stock of another corporation either domestic or foreign? No ; or (b) did any corporation, individual, partnership, trust, or association own at any time during the taxable year 50 percent or more of your voting stock? No (If either answer is "yes," attach separate schedule showing: (1) Name and address; (2) percentage of stock owned; (3) date stock was acquired, and (4) the collector's office in which the income tax return of such corporation, individual, partnership, trust, or association for the last taxable year was filed.)
10. Is this return made on the basis of cash receipts and disbursements? No. If not, describe fully what other basis or method was used in computing net income accrual
11. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower cost or market, whichever is lower If any other basis was used, describe fully, state why used, and the date inventory was last reconciled with stock
12. Did the corporation make a return of information on Forms 1096 and 1099 for the calendar year 1940 (see Instruction 8-(1))?
13. Did the corporation at any time during the taxable year own directly or indirectly any stock of a foreign corporation? (Answer "yes" or "no") No (If answer is "yes," attach statement as required by Instruction 13-(2).)

Schedule L—BALANCE SHEETS (See Instruction 10)

Page 4

ASSETS	Beginning of Taxable Year: Amount	Beginning of Taxable Year: Total	End of Taxable Year: Amount	End of Taxable Year: Total
1. Cash				$ 22,338 81
2. Notes and accounts receivable			$ 1,021 08	
Less: Reserve for bad debts				1,021 08
3. Investments (Itemize)				
4. Investments (Government obligations): (a) State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions				
(b) United States				
(c) Instrumentalities of the United States				
5. Other investments (Itemize)				
6. Capital assets: (a) Depreciable assets (Itemize)			$ 2,196 12	
Total depreciable assets			$ 2,196 12	
Less: Reserve for depreciation			196 96	1,999 16
(b) Depletable assets				
Less: Reserve for depletion				
(c) Land				
7. Other assets (Itemize) Travel Advances			$ 190 84	
Unexpired Insurance			91 84	190 84
8. TOTAL ASSETS				$ 25,549 89
LIABILITIES				
9. Accounts payable				$ 8,488 98
10. Bonds, notes, and mortgages payable: (a) With original maturity of less than 1 year				
(b) With original maturity of 1 year or more				
11. Accrued taxes (Itemize) Social Security taxes and withholding taxes			$ 722 88	
12. Other liabilities (Itemize) Provision for income and excess profits taxes			4,616 03	5,338 91
Contingent payable			$ 1,138 50	
Due to old association and members			1,408 87	2,547 37
13. Surplus reserves (Itemize)				
14. Capital stock: (a) Preferred stock				
(b) Common stock			4,500 00	4,500 00
15. Paid-in or capital surplus				
16. Earned surplus and undivided profits				8,701 63
17. TOTAL LIABILITIES				$ 25,549 89

Schedule M—RECONCILIATION OF NET INCOME AND ANALYSIS OF EARNED SURPLUS AND UNDIVIDED PROFITS

1. Total distributions to stockholders charged to earned surplus during the taxable year: (a) Cash		12. Earned surplus and undivided profits at close of preceding taxable year (Schedule L)	
(b) Stock of the corporation		14. Adjusted net income (Item 34, page 1)	13,317 66
(c) Other property		15. Nontaxable and partially exempt income: (a) Interest on: (1) Obligations of a State, Territory, or political subdivision thereof, or the District of Columbia, or United States possessions	
2. Contributions (amount over 5 percent limitation)		(2) Obligations of the United States issued on or before Sept. 1, 1917, Treasury notes, Treasury bills, and Treasury certificates of indebtedness	
3. Federal income taxes		(3) United States savings bonds and Treasury bonds owned in the principal amount of $5,000 or less	
4. Income taxes claimed as a credit in whole or in part in Item 33, page 1		(4) United States savings bonds and Treasury bonds owned in the principal amount of over $5,000	
5. Federal taxes paid on tax-free covenant bonds		(5) Obligations of instrumentalities of the United States	
6. Excess of short-term capital losses over short-term capital gains		(6) Other nontaxable interest (Itemize): (1)	
7. Additions to surplus reserves (list separately): (a)		(2)	
(b)		16. Charges against surplus reserves (Itemize): (a)	
8. Other unallowable deductions: (a)		(b)	
(b)		17. Adjustments not recorded on books (Itemize): (a)	
9. Adjustments not recorded on books (Itemize): (a)		(b)	
(b)		18. Sundry credits to earned surplus (Itemize): (a)	
10. Sundry debits to earned surplus (Itemize): (a) Provision for income and excess profits taxes	4,616 03	(b)	
11. Earned surplus and undivided profits at close of the taxable year (Schedule L)	8,701 63		
12. Total of lines 1 to 11	13,317 66	Total of lines 13 to 18	13,317 66

EXCESS PROFITS TAX (Second Revenue Act of 1940). (See Instructions for Form 1120)

(a) Is an excess profits tax return on Form 1121 being filed for the taxable period covered by this return? Yes

(b) A corporation joining in the making of a consolidated excess profits tax return should indicate below the name and address of the corporation which filed the consolidated excess profits tax return for the entire affiliated group, and the internal revenue district in which the consolidated return is filed

(c) If a personal service corporation signifies below its desire not to be subject to the excess profits tax, it shall be exempt from such tax and the provisions of Supplement S, Chapter 1, shall apply to the shareholders in such corporation who were such shareholders on the last day of the taxable year of the corporation. (Attach Form 1121PS.)

(d) If corporation claims exemption under section 727 of the Internal Revenue Code, state basis of claim

(e) If an excess profits tax return is not being filed for the reason that it is claimed that the excess profits net income computed under the invested capital method is not greater than $5,000, the following Schedule N should be filled in. The completion of Schedule N does not constitute the filing of an excess profits tax return.

Schedule N—EXCESS PROFITS NET INCOME COMPUTATION

1. Normal-tax net income (Item 30, page 1)	13,317 66	8. Dividends received credit adjustment (Item 32, page 1, excluding dividends received from foreign personal holding companies, minus Item 34, page 1)	
2. 90 percent of interest on borrowed capital		9. Income and income defense taxes (Item 30, page 1)	2,114 02
3. Net long-term capital loss (Item 11 (b), page 1)		7. Net long-term capital gain (Item 11(b), page 1)	
4. Total of lines 1 to 3	13,317 66	6. Net gain from sale or exchange of depreciable property held more than 18 months	
		5. Income from retirement of bonds, etc.	
		10. Refunds and interest on Agricultural Adjustment Act taxes	
		11. Recoveries of bad debts	
		12. Total of lines 6 to 11	2,114 02
13. Excess profits net income (for purpose of determining necessity for filing return) (line 4 minus line 12)			11,203 74

A A-4

(Testimony of C. D. Hudson.)

Respondent's Exhibit A—(Continued)

American Box Shook Export Association

Tax Return—Year Ended May 31, 1941

Gross Profit:	
Commissions earned	$40,214.78
Discounts earned	10,362.04
	$50,576.82
Other Deductions:	
Postage	$ 361.61
Stationery and office supplies	450.90
Telegraph	4,606.20
Printing blocks	57.83
Telephone	1,836.95
Miscellaneous expenses	644.92
Travel expense	2,729.40
Legal and accounting	997.01
National Wooden Box Association—Services	3,100.00
	$14,784.82

Form 1028. Treasury Department, Internal Revenue Service. Rev. March, 1936.

QUESTIONNAIRE

For Farmers', Fruit Growers', or Like Association Claiming Exemption Under Section 101 (12) of the Revenue Act of 1936.

(Testimony of C. D. Hudson.)

Respondent's Exhibit A—(Continued)

State of California

County of San Francisco—ss.

William A. Clayton, deposes and says that he is the Assistant Secretary of the American Box Shook Export Association located at 407 Crocker Building, San Francisco, California, and that the following answers and statements relative to the year ended May 31, 1941, are true to the best of his knowledged and belief:

1. Date association was organized: March 26, 1940.

2. Purpose for which organized: Exporting for members under the Webb-Pomerene Act.

3. Is the association incorporated? Yes. If so, state: (a) Date incorporated, March 26, 1940; (b) under the laws of what State? California.

4. State the amount of each class of capital stock outstanding and the value of the consideration for which it was issued: Capital stock authorized 50 shares par value $500 per share, none outstanding until June 1, 1940. (a) State the rate of dividend paid on each class of such capital stock; No dividends.

*5. State the amount of each class of capital stock owned by: (a) Producers: All. (b) Nonproducers: None. (c) Persons who were nonproducers at the time stock was acquired: None.

*6. State the circumstances surrounding the acquisition of your capital stock by nonproducers: Not applicable. (a) What provision is made for retiring

(Testimony of C. D. Hudson.)

Respondent's Exhibit A—(Continued)

the capital stock held by nonproducers: Not applicable.

7. If the association issues any nonvoting preferred stock, explain whether the owners thereof may participate in the profits of the association, upon dissolution or otherwise, beyond the fixed dividends: Not applicable.

8. What is the legal rate of interest in the State in which the association is incorporated? Seven.

9. Does the State law require the maintenance of a reserve? No. If so, state the amount of such reserve..... $.....

10. Does the association maintain any reserve or reserves other than required by the State law? No. If so, state: (a) Amount of each reserve: None. (b) Purpose for which each reserve is maintained: None maintained.

11. What are the requirements for membership in the association? By-laws Article I, Sec. 2: "New shareholders shall become so only upon application and approval by two thirds of the then shareholders of the corporation and upon purchasing one share of stock at the price fixed by two-thirds of the shareholders at the time of such approval but at not less than par."

---

* The information called for in Questions 5 and 6 above need not be supplied with respect to nonvoting preferred stock, the owners of which are not entitled or permitted to participate, directly or indirectly, in the profits of the association, upon dissolution or otherwise, beyond the fixed dividends.

(Testimony of C. D. Hudson.)

Respondent's Exhibit A—(Continued)

12. Does the association deal with both members and non-members? Not with non-members.

13. State the value of products marketed during the year for: (a) Members. No operations until June 1, 1940, $ None. (b) Nonmembers, $ None.

14. State the value of purchases made during the year for: (a) Members, $ None. (b) Nonmembers, $ None.

15. State the value of purchases made during the year for persons who are neither members nor producers. (Do not include this amount in Item 14(b)): $ None.

16. State fully the manner in which distribution is made of the proceeds of products marketed for: (a) Members: It is intended that a preliminary billing price be settled monthly with the understanding that any excess received from the sale of shook over expenses would, upon action of the organization, be subject to distribution as additional realization on shipments made during the period when such excess was accumulated. (b) Non-members: No transactions.

17. State fully the plan followed in charging for supplies and equipment purchased for: (a) Members: None. (b) Nonmembers: None.

18. Does the association pay patronage dividends? No. If so, explain how such dividends are participated in by: (a) Members..... (b) Nonmembers .....

(Testimony of C. D. Hudson.)

Respondent's Exhibit A—(Continued)

19. Is the information contained herein representative of the purposes and activities of the association since January 1, 1925, or date of organization, if organized subsequent to that date? Yes. If not, state the changes that have occurred and dates of such changes.....

20. Has the association filed income tax returns? Yes. If so, what year or years? Period from incorporation March 26, 1940, to May 31, 1940, date of beginning business.

The attached financial statements showing the assets and liabilities of the association as at the close of the year covered by this questionnaire and a classified list of the receipts and disbursements during the same year are hereby specifically made a part of this questionnaire.

W. A. CLAYTON

(Signature of a principal officer)

Subscribed and sworn to before me this 14th day of August, 1934.

[Illigible]

Notary Public in and for the City and County of San Francisco, State of California.

Attach:

Financial statements.

Articles of incorporation and by-laws.

[Stamp on face of Questionnaire]: Prepared by Rollin Rodolph & Co., Certified Public Accountants.

1940 RETURN
OF
CAPITAL-STOCK TAX
For Year Ending June 30, 1940

DOMESTIC CORPORATIONS

(Chapter 6, Internal Revenue Code, as amended)

This return must be filed, in triplicate, and received with remittance by the Collector for your district on or before July 31, 1940. (See instruction 20, page 10.)

TREASURY DEPARTMENT
Internal Revenue Service

To be stamped above by Collector showing district and date received

Name **American Box Shook Export Association**
(Print plainly name of corporation, joint-stock company, or association)

Address **306 Barr Bldg., Washington D.C. - 401 Crocker Building, S.F., Calif.**
(The address to be given is that of the principal place of business. Give street and number, city or town, and State.)

Incorporated or organized in State of **California** Month **March** Day **28** Year **1940**

Was a 1939 capital-stock tax return filed? **No** Name under which filed. (If different, attach statement explaining fully.) _____ (District _____)

Date of close of last income-tax year ended prior to July 1, 1940 **None(next 5-31-41)** Was an income-tax return filed for that year? _____ Name under which filed _____ (District _____)

If the corporation is newly organized and has not established an income-tax year, state date of organization **March 28,194**

Nature of business in detail **Exporting for members under the Webb-Pomerene Act**

Name of parent company, if any _____ (District _____)

Name of subsidiary, if any _____ shares held _____ (District _____)
(If more than one, attach list and state number of shares held by parent in each district where filed.)

AUDIT SECTION
TAX DIVISION
JUN 6 941

DECLARED VALUE OF CAPITAL STOCK **$350,000.00**

Corporations enumerated in instruction 10 on page 10 must report a definite and unqualified declared value in this block. (See also instructions 11 to 13.) **(Do not use this block for elective declaration—see block 10 below.)**

ADJUSTED VALUE—ELECTIVE DECLARED VALUE

Corporations described in instruction 5 on page 9 MUST complete Schedules I and II and enter the adjusted value (last item in Schedule I) in Part A of this block. Any corporation of this class may elect to declare, and pay tax on, a value in excess of the adjusted value. If such election is made, a definite and unqualified value MUST be entered in Part B of this block. (See instructions 14 and 15.)

PART A ADJUSTED VALUE OF CAPITAL STOCK (Last item of Schedule I, page 9)	PART B ELECTIVE DECLARED VALUE OF CAPITAL STOCK (Unless declared value must be increased or reduced as disclosed by Schedule II)
$	$

EXEMPTIONS.—The law provides for exemption from the tax only on the grounds indicated below. Corporations claiming exemption must (1) complete block 9 or 10 above whichever is applicable, (2) check the appropriate block below, and (3) submit with the return the evidence specified under the block checked.

☒ Corporation exempt from income tax under section 101, Internal Revenue Code. Furnish information required by instruction 19.

☐ Insurance company subject to tax under section 201, 204, or 207, Internal Revenue Code. State which section _____

☐ Corporation not doing business. Furnish information required by instruction 19.

COMPUTATION OF TAX	FOR USE OF TAXPAYER	FOR USE OF DEPARTMENT
Taxable value reported in item 9 or 10	$ 350 000 00	$
Tax at rate of $1 for each full $1,000 in item 12 (omit cents)	Exemption claimed xxx	xxx
Penalty of ____ percent for delinquency in filing return		
Interest at 6 percent per annum		
Total tax, penalty, and interest	None	

DUPLICATE

Treasury Department
Internal Revenue Service

(Author's name)

UNITED STATES

CORPORATION EXCESS PROFITS TAX RETURN

For Calendar Year 1940

1940

or fiscal year beginning June 1, 1940, and ended May 31, 1941

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

AMERICAN BOX SHOOK EXPORT ASSOCIATION

407 CROCKER BUILDING
(Street and number)

SAN FRANCISCO CALIFORNIA

File Code 31
Serial No. 400007
District 1-Calif
3241

AUG 15 1941

28. Portion of item 23 (in excess of $250,000 and not in excess of $500,000); and tax at 45 percent		45%	
29. Portion of item 23 (in excess of $500,000); and tax at 50 percent		50%	
30. Excess profits tax (total tax in column 3 of items 24, 25, 26, 27, 28, and 29). (In case of certain exchanges to which section 710 (a) (2) is applicable, attach schedule showing computation under that section and enter the excess profits tax so computed as item 30)			$ 1,296 46
31. Amount, if any, due to application of section 734. (Attach schedule; see Instruction XII)			
32. Total excess profits tax (line 30 plus line 31)			$ 1,296 46
33. Less: Credit for income taxes paid to a foreign country or United States possession allowed a domestic corporation not used in computing item 38, page 1, Form 1120			
34. Balance of excess profits tax due			$ 1,296 46

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

Subscribed and sworn to before me this 14th day of August, 1941

NOTARIAL SEAL

Matilda J. Schimpf
(Signature of officer administering oath)

In and for the City and County of San Francisco

CORPORATE SEAL

(President, Vice President, or other principal officer) (State title)

G. F. O'Brien
(Treasurer, Assistant Treasurer, or Chief Accounting Officer)
(State title)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the excess profits tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 11th day of August, 1941

NOTARIAL SEAL

Geraldine E. Dawson
(Signature of officer administering oath) (Title)

(Signature of person preparing the return)

Grant B. Munro
(Signature of person preparing the return)

(Name of firm or employer, if any)

NOTE—In order that this return may be accepted as meeting the requirements of the Internal Revenue Code, the data called for herein must be set forth FULLY and CLEARLY.

Treasury Department
Internal Revenue Service

UNITED STATES

CORPORATION EXCESS PROFITS TAX RETURN

For Calendar Year 1940

1940

or fiscal year beginning June 1, 1940, and ended May 31, 1941

PRINT PLAINLY CORPORATION'S NAME AND ADDRESS

AMERICAN BOX SHOOK EXPORT ASSOCIATION

407 CROCKER BUILDING

SAN FRANCISCO CALIFORNIA

File Code: 31
Serial: 400007
District: 1-Calif

3947

(a) Date of incorporation March 26, 1940 (b) State or country California

(c) Collector's office in which your income tax return for the taxable year was filed First California

(d) Is this a consolidated return? No. If so, prepare from the collector Form 851E, Affiliations Schedule, which shall be filed in, sworn to, and filed as a part of this return.

(e) In computing the excess profits credit under the invested capital method, do you elect to include in excess profits net income interest received on government obligations specified in section 22 (b) (4) of the Internal Revenue Code?

(f) Do you elect in this return to capitalize expenditures for advertising or promotion of good will as provided in section 733 of the Internal Revenue Code (see Instruction VI-a)? No.

(g) Are you an acquiring corporation of a qualified component corporation as defined in section 740 of the Internal Revenue Code? Yes
If so, and if you were actually in existence before January 1, 1940, do you elect to compute the average base period net income under the method prescribed in section 742 in lieu of the method prescribed in section 713?

(h) Are you a transferee or transferee upon an exchange (as defined by section 798 of the Internal Revenue Code) which occurred in a taxable year beginning after December 31, 1939? No.

SPECIFIC DISCLAIMER

Unless you specifically disclaim in (1) or (2) *below either the credit computed under the income method or the credit computed under the invested capital method, it is mandatory that both Schedules I and II and both Schedules A and B be completed before this form will be considered as a return. (The foregoing is applicable only to a corporation in existence prior to January 1, 1940. If you are a foreign corporation, see also Instruction V.)* For *effect of disclaimer, see Instructions V and V-a.*

(1) Do you disclaim the use of the credit computed under section 713—the income method? No.

(2) Do you disclaim the use of the credit computed under section 714—the invested capital method? No.

IF YOU HAVE NOT DISCLAIMED ONE METHOD, SCHEDULES I, II, A, AND B MUST BE COMPLETED.

EXCESS PROFITS NET INCOME COMPUTATION. (See Instruction III)

Item No.	SCHEDULE I. EXCESS PROFITS CREDIT BASED ON INCOME		
1.	Normal-tax net income (item 26, page 1, Form 1120)		$ 13,317 36
2.	Add: Net long-term capital LOSS (item 11 (h), page 1, Form 1120)		
3.	Total of items 1 and 2		$
4.	Less: Income and income defense taxes (item 30, page 1, Form 1120)	$ 2,114 92	
5.	Net long-term capital GAIN (item 11 (h), page 1, Form 1120)		
6.	Net GAIN from sale or exchange of depreciable property held more than 18 months		550
7.	Income from retirement or discharge of bonds, etc.		
8.	Refunds and interest on Agricultural Adjustment Act taxes		
9.	Recoveries of bad debts		
10.	Dividends received credit adjustment (total of columns 2 and 4, Schedule E, Form 1120, minus item 35, page 1, Form 1120)		
11.	Abnormal income attributable to other years. (Attach statement; see Instruction VIII)		
12.	Total of items 4 to 11		2,114 92
13.	Excess profits net income computed under income credit method (item 3 minus item 12)		$ 11,202 74
	SCHEDULE II. EXCESS PROFITS CREDIT BASED ON INVESTED CAPITAL		
14.	Amount of item 13		$ 11,202 74
15.	Add: 90 percent of interest on borrowed capital		
16.	Interest on government obligations. (See Question (c) above for election)		
17.	Total of items 14 to 16		$ 11,202 74
18.	Less: Dividends received credit adjustment (total of column 3, Schedule E, Form 1120, excluding dividends (actual or constructive) on stock of foreign personal-holding companies)		
19.	Excess profits net income computed under invested capital credit method (item 17 minus item 18)		$ 11,202 74

EXCESS PROFITS TAX COMPUTATION

			Column 1	Col. 2 Rate	Column 3 Amount of Tax
20	Excess profits net income (item 13 or item 19, whichever is applicable)		$ 11,202 74		
21	Less: Specific exemption	$ 5,000 00			
22.	Excess profits credit. (From Schedule A or B, whichever amount results in the lower tax, unless the use of one of the methods has been disclaimed above; or from Schedule B if the corporation is required to use the invested capital method.)	1,016 90	6,016 90		
23.	Adjusted excess profits net income (item 20 minus the sum of items 21 and 22)		$ 5,185 84		
24.	Portion of item 23 (not in excess of $20,000); and tax at 25 percent		5,185 84	25%	$ 1,296 46
25.	Portion of item 23 (in excess of $20,000 and not in excess of $50,000); and tax at 30 percent			30%	
26.	Portion of item 23 (in excess of $50,000 and not in excess of $100,000); and tax at 35 percent			35%	
27.	Portion of item 23 (in excess of $100,000 and not in excess of $250,000); and tax at 40 percent			40%	
28.	Portion of item 23 (in excess of $250,000 and not in excess of $500,000); and tax at 45 percent			45%	
29.	Portion of item 23 (in excess of $500,000); and tax at 50 percent			50%	
30.	Excess profits tax (total tax in column 3 of items 24, 25, 26, 27, 28, and 29). (In case of certain exchanges to which section 710 (a)(2) is applicable, attach schedule showing computation under that section and enter the excess profits tax as computed on item 30.)				$ 1,296 46
31.	Amount, if any, due to application of section 734. (Attach schedule; see Instruction XII)				
32.	Total excess profits tax (line 30 plus line 31)				$ 1,296 46
33.	Less: Credit for income taxes paid to a foreign country or United States possession allowed a domestic corporation not used in computing item 30, page 1, Form 1120				
34.	Balance of excess profits tax due				$ 1,296 46

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct, and complete return, made in good faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

Subscribed and sworn to before me this 14th day of August, 1941

NOTARIAL SEAL — Matilda V. Schimpf (Signature of officer administering oath) NOTARY PUBLIC (Title) In and for the City and County of San Francisco, State of California

CORPORATE SEAL — H. O. Dunn (Signature of president, vice president, or other principal officer) President (Title) and H. O. Dunn (Signature of treasurer, or chief accounting officer) Treasurer (Title)

I/we swear (or affirm) that I/we prepared this return for the person named herein and that the return (including any accompanying schedules and statements) is a true, correct, and complete statement of all the information respecting the excess profits tax liability of the person for whom this return has been prepared of which I/we have any knowledge.

Subscribed and sworn to before me this 14th day of August, 1941

NOTARIAL SEAL — Louise E. Duncan (Signature of officer administering oath) (Title) (Signature of person preparing the return) and (Signature of person preparing the return) P.A.W. (Name of firm or employer, if any)

NOTE.—In order that the return may be accepted as meeting the requirements of the Internal Revenue Code, the data called for herein must be set forth FULLY and CLEARLY.

C C-1

Schedule A.—EXCESS PROFITS CREDIT—BASED ON INCOME. (See Instruction VII)

	1. Year ended May 31, 1937	2. Year ended May 31, 1938	3. Year ended May 31, 1939	4. Year ended May 31, 1940
1. Normal-tax (or special-class) net income	$	$ 208 85	$ 6,242 44	$ 2,682 28
2. (a) Net capital gain used in computing line 1				
(b) Net capital loss used in computing line 1				
3. Difference between lines 1 and 2(a) (if a net capital gain), or total of lines 1 and 2(b) (if a net capital loss)	$	$	$	$
4. Add: Deduction which are capital assets deducted in computing line 1 as bad debts or as stock determined to be worthless (for taxable years beginning prior to January 1, 1939)				
5. Net short-term capital gain				
6. Net long-term capital gain				
7. Net gain from sale or exchange of property other than capital assets (for taxable years beginning prior to January 1, 1939)				
8. Total of lines 5 to 7	$	$	$	$
9. Less: Net long-term capital loss	$	$	$	$
10. Net loss from sale or exchange of property other than capital assets (for taxable years beginning prior to January 1, 1939)				
11. Total of lines 8 and 10	$	$	$	$
12. Normal-tax (or special-class) net income (after applying section 711(b)(2)) (line 9 minus line 11)	$	$	$	$
13. Add: Dividends received credit. (See line 25, below)				
14. Deductions on account of retirement or discharge of bonds, etc.				
15. Casualty, demolition, and similar losses				
16. Repayment of processing tax to vendees				
17. (a) Abnormal judgment liabilities, etc. (attach statement)				
(b) Abnormal expenditures for intangible drilling and development costs (attach statement)				
(c) Other abnormal deductions (attach statement)				
18. Capitalization of expenditures for advertising or promotion of good will (attach statement)				
19. Net long-term capital loss. (See line 6, above)				
20. Total of lines 13 to 19	$	$	$	$
21. Less: Income taxes	$	$	$	$
22. Income from retirement or discharge of bonds, etc.				
23. Dividends received from domestic corporations				
24. Net long-term capital gain (See line 6, above)				
25. Net gain from sale or exchange of depreciable property held for more than 18 months				
26. Total of lines 21 to 25	$	$	$	$
27. Excess profits net income (line 20 minus line 26)	$	$ 104 53	$ 6,242 44	$ 2,682 28

28. Net aggregate of columns 1, 2, 3, and 4 (see Instruction VI for computation of deficit in excess profits net income and substitution of zero for largest deficit figure. Attach schedule showing detailed computation) $ 2,790 81

29. Average base period net income—General average (line 28 divided by number of months in base period, multiplied by 12) $ 837 24

Use lines 30 to 36 for computation of average base period net income where there were increased earnings in last half of base period:

30. Net aggregate of columns 2 and 4 (See Instruction VI, par. (c) and (f) regarding deficit in excess profits net income; and par.
(f) regarding taxable year ending after May 31, 1940) $
31. Net aggregate of columns 1 and 3 (See instruction, line 30) $
32. Excess of line 30 over line 31 $
33. One-half of line 32
34. Line 30 plus line 33 $
35. Line 34 divided by number of months in second half of base period, multiplied by 12 $
36. Average base period net income—Increased earnings in last half of base period (line 35 or the highest excess profits net income for any taxable year in the base period, whichever is lower) $
37. 95 percent of line 29 or line 36, whichever is greater $ 642 12
38. Net capital addition $ 4,620.03 ; or net capital reduction $ ..... (attach schedule). 264 08
39. 6 percent of line 29, if a net capital addition (or 6 percent of line 36, if a net capital reduction)
40. Excess profits credit—based on income (line 37 plus line 39, if a net capital addition) (or line 37 minus line 39, if a net capital reduction) $ 1,016 90

Schedule B.—EXCESS PROFITS CREDIT—BASED ON INVESTED CAPITAL. (See Instruction VII)

Equity Invested Capital at the Beginning of the Taxable Year

1. Money paid in for stock, or as paid-in surplus, or as a contribution to capital		$
2. Property paid in for stock, or as paid-in surplus, or as a contribution to capital		
3. Distributions of earnings and profits in stock of the corporation		
4. Accumulated earnings and profits		
5. Increase on account of gain on tax-free liquidation		
6. Total of lines 1 to 5		$
7. Less: Distributions made prior to the taxable year not out of accumulated earnings and profits	$	
8. Earnings and profits of another corporation if included in line 4, above		
9. Reduction on account of loss on tax-free liquidation (not in excess of line 4)		
10. Total of lines 7 to 9		
11. Equity invested capital at beginning of taxable year (line 6 minus line 10)		$

Average Addition to Equity Invested Capital During the Taxable Year

12. Money paid in for stock, or as paid-in surplus, or as a contribution to capital	$ 4,486 03	
13. Property paid in for stock, or as paid-in surplus, or as a contribution to capital		
14. Distributions of earnings and profits (other than earnings and profits of the taxable year) in stock of the corporation (see line 10, below)		
15. Increase on account of gain on tax-free liquidation		
16. Total additions in lines 12 to 15		4,486 03
17. Total of lines 11 and 16		$ 4,486 03

Average Reduction in Equity Invested Capital During the Taxable Year

18. Distributions not out of earnings and profits of the taxable year	$	
19. Stock distributions from accumulated earnings and profits at beginning of year (see line 14, above)		
20. Reduction on account of loss on tax-free liquidation (see line 9 for limitation)		
21. Total reductions in lines 18 to 20		
22. Average equity invested capital (line 17 minus line 21)		$ 4,486 03
23. Average borrowed capital (attach schedule)	$	
24. Average borrowed invested capital (30 percent of line 23)		
25. Average invested capital (line 22 plus line 24)		$ 4,486 03
26. Total inadmissible assets	$	
27. Total admissible and inadmissible assets	$	
28. Percentage which line 26 is of line 27	%	
29. Reduction on account of inadmissible assets (..... percent of line 25)		
30. Invested capital (line 25 minus line 29)		$ 4,486 03
31. Excess profits credit—based on invested capital (6 percent of line 30)		$ 264 08

(Testimony of C. D. Hudson.)

Respondent's Exhibit A—(Continued)

Office of The Collector, First District of California.
In replying refer to Serial No. Aug. 400007-F. Y. '41 (6-2-40 - 5-31-41)

Treasury Department, Internal Revenue Service, Federal Office Building, San Francisco, California. Aug. 26, 1941.

(Stamp]: Received Aug. 27, 1941. By.....
American Box Shook Export Association,
407 Crocker Bldg., San Francisco, Calif.

An examination of your income tax return for the taxable fiscal year 1940 discloses that the affidavit not properly executed.

You are requested to return this letter within 10 days from the date hereof with the affidavit is not properly executed.

Respectfully,
CLIFFORD C. ANGLIM,
Collector.

Title of second officer signing omitted. Signature should be that of Treas. or Asst. Treas. or CAO.

AFFIDAVIT

We, the undersigned, president (or vice president, or other principal officer) and treasurer (or assistant treasurer, or chief accounting officer) of the corporation for which this return is made, being severally duly sworn, each for himself deposes and says that this return (including any accompanying schedules and statements) has been examined by him and is, to the best of his knowledge and belief, a true, correct and complete return, made in good

(Testimony of C. D. Hudson.)

Respondent's Exhibit A—(Continued)

faith, for the taxable year stated, pursuant to the Internal Revenue Code and the regulations issued thereunder.

(Corporate Seal)

J. WALTER RODGERS,
President

J. F. O'BRIEN,
Treasurer

Subscribed and sworn to before me this 29th day of August, 1941.

(Notarial Seal)

MATILDA J. SCHIMPF,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission expires Dec. 23, 2944.

Audit Section, Room 250 "Audit Form O"

By Mr. Murray:

Q. Mr. Hudson, did you have anything to do with the making of the federal tax returns of the American Box Shook Export Association for the fiscal year ended May 31, '41?

A. Well, may I see that return, just to refresh my memory?

Q. Yes. (Handing).

A. Well, I think this much connects with it. I had gone over the annual statement with the accountants, and I believe had been given a prelimin-

(Testimony of C. D. Hudson.)

ary copy of the return, and no doubt understood exactly what the return would be before it was submitted.

Q. And that, I take it, refers to the questionnaire attached to the return as well. I notice that is signed by Mr. W. A. Clayton.

A. Yes. Mr. Clayton was the manager of the San Francisco office, and I believe serving as assistant secretary. I am not sure that I saw this questionnaire before it was turned in, but I am certain that I was in touch with Mr. Clayton, and that if there was any question involving policy, or involved in this, that perhaps he discussed it with me at the time. My name doesn't appear on this, because this was handled here in San Francisco, and I was doubtless in Washington at the time.

Q. Well, on Page 3 of the questionnaire, attached to the returns, is the following statement, in answer to a question numbered 16 on the questionnaire.

The quote is as follows:

"It is intended that a preliminary price be settled monthly with the understanding that any excess received from the sale of shook over expenses would, upon action of the organization, be subject to distribution as additional realization on shipments made during the period when such excess was accumulated."

I ask you, assuming you know, whether action was taken by this taxpayer organization in connection with all distributions made by the corporation?

(Testimony of C. D. Hudson.)

A. Yes. I would say that the word "action" may or may not be as definite as you have in mind.

The directors discussed the realization over a given period. Naturally there was a feeling there should be held back a cushion, or you might say a small revolving fund to take care of contingencies, and so it was just a matter of judgment as to whether we could safely distribute 50 cents or 75 cents or $1 a thousand additional in view of the returns to date, and that phrase there, "upon action of the organization," referred to that policy, that it would be a matter of judgment to be determined by the directors as to how much of the additional realization might safely at that [66] moment be paid against shipments.

Q. Well, then, it was necessary, and that necessity was recognized in connection with every distribution, that the directors act in accordance with it, is that right?

A. That the directors more or less approve the distribution.

Q. Well, they had to approve it before it was made, of course? A. That's right.

Q. And that was necessary to their plan?

A. Well, the phrase occurs in there, "upon action of the organization." It occurs in the minutes, I believe, of July, that we read, and in that statement carried on the questionnaire, that phrase occurs, and I am sure that was understood to mean that the directors should approve of any additional realization, merely because it was a matter of judg-

(Testimony of C. D. Hudson.)

ment as to whether there were still some delayed liabilities which might dissipate some of that additional realization later.

Q. The taxpayer corporation here, I believe you stated, existed for several years as an unincorporated organization? A. That's right.

Q. Was it exactly the same name?

A. The same name exactly.

Q. I would like to ask you if you know whether this [67] minute of May 6, 1940, a part of which you read into the record a while ago, referred to the unincorporated or the incorporated Association?

A. That motion that I read very definitely referred to the by-laws of the corporation that was then being formed and set up.

Q. But then you hadn't had any meetings—there wasn't any board of directors, or anything, of the corporation at that time, apparently, is that right?

A. Yes, the corporation was in process. We had secured a California license, I believe in March of that year, and the directors were meeting as directors of the corporation. Our fiscal year did not start until June of that year, but necessarily there were meetings prior to that, and we were transacting business as directors—they were, rather.

Q. Are you presently familiar with the application for the permit to issue shares of capital stock, and the articles of incorporation and the by-laws of this taxpayer Association?

(Testimony of C. D. Hudson.)

A. Well, I have read them all through. I haven't refreshed my memory on them in recent months.

Mr. Murray: I understand, if Your Honor please, that counsel for the Petitioner will stipulate that the articles of incorporation and the by-laws say nothing about distributions of any kind to the members. They are silent on it. It is by his wishes that they are not being placed in. [68]

Mr. Wallace: Well, counsel, if you want the articles and the by-laws, I don't want to raise any objection. I suggest that they are quite long, and it will create an extensive record, but I have no objection if you want them in.

Mr. Murray: I have no objection to not having them in, if you admit those facts.

Mr. Wallace: Except as the by-laws may have been amended. There certainly is nothing in the original by-laws with respect of distribution.

Mr. Murray: Are there any amendments?

Mr. Wallace: You have just heard the witness read one.

Mr. Murray: He speaks of an amendment to the by-laws, not to the article.

Mr. Wallace: There are no amendments so far as I know, to the articles of incorporation.

Mr. Murray: Well, then, I will ask the witness:

By Mr. Murray:

Q. Do you know of any amendments that were actually made to the by-laws of this incorporation?

(Testimony of C. D. Hudson.)

A. No, I don't know of any. The motion so recorded there, amending the by-laws to provide for payment of this additional realization on dollar value, that amendment was never actually put into the by-laws. [69]

Q. Mr. Hudson, do I understand correctly that the basis for distribution is the number of board feet that each stockholder furnished to these shipments during the year, irrespective of what shipments his particular merchandise went into?

Mr. Wallace: May I have the question, please?

(Question read by Reporter.)

Mr. Murray: I would like to correct that. Irrespective of which particular shipment his particular board feet went into.

Mr. Wallace: That is not quite clear to me. It may be to the witness.

The Witness: I will answer, yes, with the understanding that you are asking me whether the distribution was against total footage shipped, rather than by some segregation of shipments, or may I illustrate that, over a given period—included in the year in question, we made shipments possibly to United Kingdom, to Ireland, to South Africa, and perhaps to the Persian Gulf. Those shipments were all totalled, and the distribution was against the total shipments prorated according to that part shipped by each member, so there was no classification of, say, butter boxes versus orange boxes. The distribution was on a prorata basis against all of them.

(Testimony of C. D. Hudson.)

Q. It is not true that also there was no attempt made [70] to identify the shook furnished by one stockholder with the particular shipment which that shook went out of the country in? I mean, did you attempt to identify anybody's products, following it through from the time you took it until the time you sold it, and then reimburse him on that basis? Did you do that?

A. We have always asked the mills to identify their shook by route, putting a mark as the shook goes through a re-saw. It isn't always practical, however, and while theoretically we hoped we could always identify, actually it was not always possible.

Q. Were you generally familiar with the application for the permit to issue shares of capital stock which was made ot the Division of Corporations, Department of Investment of the State of California, just prior to the issuance of the stock of this company here in question?

A. Those matters were handled by Mr. Slack, our counsel here in San Francisco, and I was probably as familiar with the matter as any client would be with his counsel.

Q. I show you what purports to be a copy of that application, and ask you to look at sub-paragraph (d), and see if you are familiar with that, if you know about that. (Handing).

A. I am familiar with that, yes, sir.

Q. And the sub-division that you are looking at is the way you understand it, is that right? [71]

A. That's right.

(Testimony of C. D. Hudson.)

Mr. Wallace: I will stipulate, counsel, that that is an accurate copy, and you may read any part of it that you desire into the record.

Mr. Murray: The witness has said that is the way he understands it, though.

The Witness: Yes.

Mr. Murray: And I would like to read this subparagraph from the application just mentioned, which reads as follows:

"Applicant proposes to transact business by purchasing box shook exclusive for export, and will not engage in the manufacture or sale of any commodity in domestic commerce."

By Mr. Murray:

Q. Mr. Hudson, I understand that you were manager and had a lot to do with the unincorporated Association, and then afterwards the incorporated Association? A. That's right.

Q. Could you tell why the Association was incorporated?

A. We started out originally as a fact-finding organization in 1935. We charged dues. Each member paid $15 a month. Under that arrangement we were to return to members information as to export markets. We made surveys of markets in 25 or 30 countries. We thought at that time our only activity would be to place information which would lead to export sales [72] by the individual manufacturers. It developed, however, that plan was not entirely practical or worthwhile, and we would

(Testimony of C. D. Hudson.)

of necessity have to go into business as a trading organization. The member mills didn't want to set up within each organization an export department, and it was apparent that we would have to serve as that export department, and so we got into business. It was also very apparent that a loosely formed, unincorporated group was not in position to handle business and to deal with banks and to arrange credits, and so a natural sequence was that we took action to incorporate. At the same time we did take in some additional members, expanding the scope of the organization.

Q. Well, then, is it a truthful statement to say that you incorporated so as to get the advantages of a corporation?

A. We incorporated, you might say, to get the advantages and yet, in order——

Mr. Wallace (Interposing): If Your Honor please, I think counsel should list the advantages first before he asks the general question.

The Witness: We found there were some disadvontages, too.

Mr. Wallace: I will withdraw the objection, counsel; it is all right. Counsel has suggested that we stipulate that this corporation was not formed under the California laws with respect of non-profit co-operative organizations, [73] and it was not so formed. It was formed under the regular California corporate statutes without reference to a non-profit organization.

Mr. Murray: That is the stipulation that I

(Testimony of C. D. Hudson.)

wanted, and I think that is all, if you Honor please, with this witness.

Redirect Examination

By Mr. Wallace:

Q. Mr. Hudson, you made counsel for the government ask you a question or two with respect of the various footages sold by the various corporations that entered into the distribution of the funds.

I call your attention to the report of the minutes of June 9, 1941, and call your attention to the second page. There is a list there of the various members, with various footages and percentages after their names.

Are those the percentages, first the footage of lumber sold by each of your member corporations, and then the percentage of the total?

A. This list represents all shipments for the fiscal year ending May 31st, and after each member's name appears the total footage shipped during the year, and the percentage of that footage as to the entire total.

Mr. Wallace: With counsel's and the Court's permission, I will just hand this long list to the Reporter, and [74] ask her if she will write that into the record. Then you will have it accurately.

If we may just pass this a moment, Your Honor, I will see if we have a copy of the entire minute.

Counsel for the government suggests it all go in, and if we can find a copy, we will put the duplicate in.

(Testimony of C. D. Hudson.)

By Mr. Wallace:

Q. Mr. Hudson, in answer to one of the questions propounded by Mr. Murray, you called yourself a one-man organization. What do you mean by that?

A. Well, the duties of keeping the minutes, making the sales and collections and paying the bills, all seemed to fall upon me at that time. Later we did expand it, and I should give credit to my associates, but in the first place, the organization was more or less conceived by me, and I contacted members of the industry, and induced them to come in, and during those subsequent years I handled all the details.

Q. What about the year in question, '40-'41?

A. The year in question, we had a larger volume, and had an office here as well as in Washington, and while we had very competent help here in San Francisco, it was natural that I should continue to handle perhaps many of the details which might have well been dropped by me, but I did continue to handle, such as taking care of the minutes, and I am still consequently in touch with all the details. [75]

Q. With reference to the minute book and to the various minutes that were read, counsel asked you as to how those came to be prepared. I want to ask you whether the minutes contained in this book to which reference has been made accurately reflect the transactions held at the meetings of the board of directors of the American Box Shook Export Association? A. They do.

(Testimony of C. D. Hudson.)

Q. And when you wrote up the minutes you were writing up the minutes after a meeting had been held for the purpose of recording what had been done at that meeting?

A. That's right, and the minutes in all instances named exactly those who were present, and none others.

Mr. Wallace: If Your Honor please, I have found an additional copy of the minutes of the meeting of June 9, 1941, which the witness has identified a moment ago, and which I would like to put into evidence as the Petitioner's Exhibit 3.

Mr. Murray: No objection.

The Court: Exhibit 3.

(The document referred to was marked and received in evidence as Petitioner's Exhibit No. 3.)

PETITIONER'S EXHIBIT No. 3

American Box Shook Export Association
Barr Building, Washington, D. C.
Crocker Building, San Francisco, Calif.

MINUTES OF ADJOURNED ANNUAL MEETING OF STOCKHOLDERS OF THE AMERICAN BOX SHOOK EXPORT ASSOCIATION

Held at office of Western Box Distributors, Monadnock Building, San Francisco, June 9, 1941 —1:00 p.m. (adjourned from June 2, 1941.)

(Testimony of C. D. Hudson.)

Present:

Stockholders	Representative
American Box Corporation	Albert Pearlman
Calif. Pine Box Distributors	J. F. O'Brien and A. W. Pinger
Dwight Lumber & Box Co	W. A. Dwight
Western Box Distributors	J. W. Rodgers
Western Pine Mfg. Co. Ltd	Grant Dixon
Ewauna Box Company	C. W. Hornibrook
American Box Shook Export Association	C. D. Hudson and W. A. Clayton

The meeting was called to order by President J. Walter Rodgers.

Minutes of the meetings of February 12, 1941 and June 2, 1941 were read and approved.

The general financial report of the Association was given by C. D. Hudson, general manager. He stated that the taxable income at the end of the fiscal year 1941 amounted to $13,317.66. It was also reported that a sufficient reserve had been set up on the books to take care of pending claims.

A report on shipments for the fiscal year ending May 31, 1941, showed shipments by the various members as follows:

	Footage	Percentage
American Box Corporation	3,608,530	23.52
Brewer Pine Box Company	984,342	6.42
Calif. Pine Box Distributors	1,408,218	9.18
Dwight Lumber & Box Company	570,600	3.72
Ewauna Box Company	429,353	2.80
Western Box Distributors	2,154,334	14.04
Western Pine Mfg. Co. Ltd.	1,979,359	12.90
Weyerhaeuser Sales Company	.....	.....
Kesterson Lumber Corp.	240,055	1.56
White Pine Sash Company	1,144,985	7.47
E. H. Barnes	996,670	6.99
New England Box Co.	1,601,746	11.40
Total	15,118,192	100%

(Testimony of C. D. Hudson.)

Mr. Hudson reported on prospects for sales to the United Kingdom and to South Africa.

Attention was called to a recent revision in the Neutrality Act of 1939, regarding the execution of Title Oaths, which necessitates a revision in the resolution as adopted by the directors of the Association June 7, 1940.

On motion, duly seconded, the following revised resolution was unanimously adopted:

> Resolved, that William A. Clayton, assistant secretary of this corporation be, and he is hereby authorized in the name of, and on behalf of, this corporation to appoint an agent or agents to sign and verify, by oath or affirmation, statements, shipper's export declarations and other documents including affidavits required for compliance with section 2, sub-section C, of the Neutrality Act of 1939 relative to goods, wares and merchandise exported from San Francisco, California, or from any other port or ports of the continental United States, with full power and authority in such agent, or agents, to do everything whatsoever requisite or necessary to be done in said matters; said William A. Clayton is further authorized to evidence the authority of such agent or agents by powers of attorney executed by him in the name of this corporation and over the corporate seal, such powers of attorney to be in such form as from time to time may be required.

(Testimony of C. D. Hudson.)

The stockholders then elected the following directors for the ensuing year:

American Box Corporation—Albert Pearlman.
E. H. Barnes Company—E. J. Manning.
Brewer Pine Box Company—Oscar Z. Brewer.
Calif. Pine Box Distributors—J. F. O'Brien.
Dwight Lbr. & Box Company—Ward A. Dwight.
Kesterson Lbr. Corporation—I. E. Kesterson.
New England Box Company—Nathan Tufts.
Western Box Distributors—J. Walter Rodgers.
Western Pine Mfg. Co., Ltd.—Grant Dixon.
White Pine Sash Company—H. G. Klopp.
Weyerhaeuser Sales Company—Thos. McCulloch.

On motion by Mr. Hornibrook, seconded by Mr. Dwight, the following resolution was unanimously adopted:

> Resolved, that the acts of Directors as such of the American Box Shook Export Association during the fiscal year ending June 1, 1941, be hereby confirmed, ratified and approved.

Meeting was adjourned at 3:00 p.m.

W. A. CLAYTON,
Assistant Secretary

By Mr. Wallace:

Q. Mr. Hudson, you referred during your cross-examination to a California license. I assume by that you meant the articles of incorporation? [76]

A. That's right.

Mr. Wallace: That is all.

Mr. Murray: That is all.

The Court: You are excused.

(Witness excused.)

Mr. Wallace: Mr. J. F. O'Brien.

Whereupon,

J. F. O'BRIEN

called as a witness for and on behalf of the Petitioner, having been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: May we have your name, please?

The Witness: J. F. O'Brien.

The Clerk: J. F. O'Brien, thank you.

By Mr. Wallace:

Q. Where is your residence, Mr. O'Brien?

A. San Francisco.

Q. And what is your business?

A. General Manager of the California Pine Box Distributors.

Q. Is the California Pine Box Distributors a manufacturing or a sales organization?

A. It is a co-operative selling organization.

Q. And what products does it sell? [77]

A. Box shook.

Q. Is that organization a member of the American Box Shook Export Association?

A. Yes, sir.

(Testimony of J. F. O'Brien.)

Q. When did it become a member?

A. 1939.

Q. Do you recall what part of 1939?

A. Along in the fall.

Q. And were you then the Manager of the California Pine Box Distributors?

A. At that time I was the secretary and treasurer. I became Manager the first of 1940, February 1st of 1940.

Q. How did California Pine Box Distributors come to be a member of this Association?

A. Well, we became interested in some export business, and we knew that an export Association was functioning. Mr. Hudson had been for years secretary-manager of the National Wooden Box Association, and our mills belonged to his trade Association and we knew that he had developed an export association in conjunction with some of the other members of the Wooden Box Association, and we just wanted in. We either wanted to get in that one, or else form another one, because we wanted some export business.

Q. Who did you discuss that with?

A. With Mr. Hudson. [78]

Q. Were you, after your California Pine Box Distributors became a member of the American Box Shook Export Association, did you become a director of American Box Shook? A. Yes.

Q. Have you remained such. A. Yes, sir?

Q. Were you not the first secretary and treasurer of the incorporated American Box Shook Export Association? A. Yes, sir.

(Testimony of J. F. O'Brien.)

Q. You were secretary and treasurer, I believe, during the period of 1940 to 1941?

A. I believe so.

Q. Did your Association, the California Pine Box Distributors, make any contracts of sale with American Box Shook Export Association during the year from June 1, 1940 to May 31, 1941?

A. We made verbal commitments to them, to the Association, yes.

Q. Well, what were those commitments? What do you mean by "verbal commitments"?

Mr. Murray: Object to that as being incompetent, irrelevant and immaterial in this case, what verbal commitments were made to this corporation between the stockholders and the corporation.

The Court: Objection overruled. [79]

Mr. Murray: May I have an exception, please?

A. Well, Mr. Hudson would come out from the East and tell us that he thinks he can sell so much of a certain commodity, we will say for illustration, orange boxes for shipment within a certain date and a certain period, and "How many cars could you furnish, or do you want to furnish," or "Do you want any?" He would ask each of the individual mills, and we would check with our various mills—we represented ten different mills—to determine how much we could take of a particular orange contract that he had a chance to sell. After we found that we could furnish a certain quantity, we would make a commitment to Mr. Hudson, and naturally inquire from him the price we expected

(Testimony of J. F. O'Brien.)

to get, and he would tell us what he thought he could guarantee us as a minimum, and if we were satisfied we made a commitment to furnish.

Q. How then did you bill or invoice?

A. We invoiced at the price we discussed when we made the commitment, when Mr. Hudson came out and we made a commitment of a certain quantity at a certain minimum price, and that was the price that we invoiced at.

Q. You referred to another minimum price. Was there any other price?

A. Not unless we had a profit.

Q. Now unless who had a profit?

A. Unless he secured additional realization. [80]

Q. And then what happened?

A. We expected to get it.

Q. Well, if he did make additional realization, then what happened?

A. If he did not make one?

Q. If he did make one, then what happened?

A. Then we would get it.

Q. Did you bill for it or not?

A. In some cases we billed for it. In other words, at the end of the year, when we closed our own books and we wanted to determine whether we had any money coming, why, we invoiced the Association after action by our board, that they were going to pay so much.

Q. Let me get the parties straightened out. You say "we" and "our board." I want to get the dis-

(Testimony of J. F. O'Brien.)

tinction between "California Pine Box Distributors," whom you represented, and "American Box Shook Export Association," of which you were a director and the secretary and treasurer. We are talking about contracts of sale between your California Pine Box Distributors and American Box Shook Export Association.

What did California Pine Box Distributors do with respect of these minimum billings?

A. Well, we invoiced the American Box Shook Export Association at the minimum price, and that is all we did until later, if I would attend a meeting of the Export Association [81] and as a director of the Association learn that it was contemplated paying another dollar per thousand to certain shipments, then I would go back to our office and set up a debit against the Association.

Q. By "our office" you mean California Pine Box Distributors?

A. California Pine Box Distributors.

Q. And they would then bill for an additional amount, is that correct? A. That's correct.

Q. Mr. O'Brien, I show you one of a number of checks, all of which have been introduced here as Petitioner's Exhibit 2, and ask you if among those checks was one paid to your Association?

A. Yes, sir.

Q. What was the amount? A. $704.11.

Q. Do you know how that amount was calculated?

(Testimony of J. F. O'Brien.)

A. Yes, it was calculated on the basis of footage first.

Q. I show you the minutes of an annual meeting of the stockholders of the American Box Shook Export Association, held June 9, 1941, and which had been introduced into evidence as Petitioner's Exhibit 3. I call your particular attention to the number of items at the top of the second [82] page.

Does the name of your company appear there?

A. Yes, sir.

Q. California Pine Box Distributors?

A. Yes, sir.

Q. What is the first item after——

A. Footage, 1,408,218 feet.

Q. And the next item?

A. Percentage, 9.18 per cent.

D. Do you know to what those figures and that percentage refer?

A. I assume that they mean what they say they do, but I leave it to our bookkeeper to check the figures. In other words, if I said 1,408,000, it might be 1,406,000, if there is an error, but generally we check them when we get the remittance.

Q. That is footage percentage that you sold to the American Box Shook Association in that year?

A. Yes, sir.

Q. And the percentage of the total?

A. Yes, sir. I don't believe that we had billed the Association in that particular year for it. I think we started that practice subsequently, the billings.

(Testimony of J. F. O'Brien.)

Q. You mean you don't think you billed the Association before you got that particular check? [83]

A. I wouldn't testify that we did. I would rather want to check our records.

Q. Do you know whether you got a letter similar to the letter addressed to the Western Box?

A. Yes, we have that letter.

Q. Now, Mr. O'Brien, this arrangement that you have testified to, under which your California Pine Box Distributors Association sold lumber to American Box Shook Export Association, did that preliminary billing price arrangement continue throughout this fiscal year of June 1, 1940 to May 31, 1941? A. Yes, sir.

Q. Has it continued since? A. Yes, sir.

Q. Has there been any change?

A. We have never made a sale except with the understanding that it is preliminary, that any additional realization is ours.

Mr. Wallace: That is all.

Mr. Murray: No questions.

The Court: You are excused.

(Witness excused.)

Whereupon,

J. W. RODGERS

called as a witness for and on behalf of the Petitioner, having [84] been first duly sworn, was examined and testified as follows:

Direct Examination

The Clerk: May we have your name?

The Witness: J. W. Rodgers, R-o-d-g-e-r-s.

By Mr. Wallace:

Q. Mr. Rodgers, where is your residence?

A. In San Jose.

Q. And what is your business?

A. Lumber and box business.

Q. Are you an officer or a director of any lumber or box association or business?

A. I am president of the Western Box Distributors and vice-president of the Lassen Lumber and Box Company.

Q. What is the Western Box Distributors?

A. It is a sales agency, selling the product of five manufacturers, box manufacturers.

Q. Does that Western Box Distributors belong to the American Box Shook Export Association, is it a member?

A. Yes, we are a member.

Q. When did it become a member?

A. In 1939, either November or December. I don't have the exact date.

Q. Under what circumstances did it become a member?

(Testimony of J. W. Rodgers.)

A. As a result of the War, the export box business [85] switched from the Scandinavian countries to the United States. The Scandinavian countries were blockaded, and Mr. Hudson had made some surveys. We were all anxious to participate in the export business. It seemed more profitable and we needed additional volume. Mr. Hudson came to California and discussed the matter with us, and we became a member on his solicitation. In fact, we were delighted to do so.

Q. Did you—and by "you" I am now referring to your Association, Western Box Distributors,—ever make any sales of lumber in the export trade through the American Box Shook Export Association? A. Not lumber, we sold box shook.

Q. I beg your pardon. That is a lawyer's mistake.

Did you ever sell any box shook?

A. Yes, we sold box shook continuously from the time of our membership.

Q. Did you have any agreements or understanding with the American Box Shook Export Association as to the terms of those sales?

A. Mr. Hudson would indicate a price that he could afford to pay us. Sometimes it was agreeable to us, and sometimes it wasn't. He would tell us that there was a ceiling price, and any additional realization we would naturally participate in, that amount being uncertain, all depending on what his overhead was and his claims, and everything [86] connected with the Export Association.

(Testimony of J. W. Rodgers.)

Q. Did that arrangement continue through this fiscal year?

A. Well, it was our understaonding from the outset that that was the arrangement.

Q. Has there been any variation in that arrangement from the time you became a member to this moment?

A. Only in the matter of realization that we got.

Q. You mean only in the matter of the amount?

A. The matter of the amount of realization that we got. The amounts varied from year to year, depending on the volume handled.

Q. And you received a realization dependent upon your prorata of the amount of business?

A. Our participation per thousand feet board measure.

Q. And that arrangement continued throughout all the period that you have been a member?

I understand, Mr. Rodger, you were the first president? A. That's right.

Q. And you continued to be such, I take it, during the first year of the corporation?

A. That's correct.

Q. What are the duties of the president? What did he do? [87]

A. Very little except to preside at meetings.

Q. Who ran the organization?

A. Mr. Hudson, the secretary—or the manager.

Mr. Wallace: I think that is all.

Mr. Murray: No questions.

The Court: You are excused.

(Witness excused.)

Mr. Wallace: Petitioner rests.

The Court: Any witnesses on behalf of the Respondent?

Mr. Murray: No further evidence, just the return which I have already placed in evidence.

The Court: You may file briefs under the rule.

The Clerk: The main brief will be due November 4th, reply briefs November 19th.

Mr. Murray: May I have thirty days for that reply brief in this case, if Your Honor please, in view of the time lost in sending it back and forward? I really believe I want to file a reply in this case, and fifteen days would hardly give me time.

The Court: Thirty days to both parties.

Mr. Wallace: Thank you, Your Honor.

The Clerk: November 4th and December 4th.

Mr. Wallace: Thank you.

(Whereupon, at 11:30 a.m. Wednesday, September 20, 1944, the hearing in the above-entitled matter was closed.) [88]

[Endorsed]: T.C.U.S. Filed Oct. 14, 1944.

[Title of Tax Court and Cause.]

PETITION FOR REVIEW

Appellant files this its Petition for Review by the United States Circuit Court of Appeals for the Ninth Circuit of the Decision of the above entitled Tax Court, rendered April 11, 1945, and for grounds of petition alleges:

I.

Appellant filed with the Collector of Internal Revenue for the First District of California its income and excess profits tax returns for the fiscal year ended May 31, 1941. That said Collector's office is within the Ninth Circuit of the United States Circuit Courts of Appeals.

II.

That the nature of the controversy is the liability of Appellant for income and excess profits taxes for the fiscal year ended May 31, 1941 in the respective amounts of $1952.15 and $1270.32, which amounts were assessed as deficiencies by [116] Appellee for said year, and involves the question as to whether or not, as a matter of law, Appellant, a corporation registered under the Webb Pomerene Act for the purpose of engaging in export trade only, is liable for such income and excess profits taxes where its sole business and obligation is to export lumber products for its members without profit to itself. Also whether, assuming it was liable for income and excess profits taxes, the sum of $7,559.11, paid by appellant to its members during the fiscal year as additional realization on sales, was properly excluded from the income tax returns filed by Appellant as income of Appellant; and whether the sum of $4,000.00 claimed as a deduction by Appellant as a reserve for anticipated and contingent claims was a proper deduction as a matter of law. Appellee denies the right of Appellant to claim such exemption and the right of appellant in any

event to make such deductions which contentions were sustained by the Tax Court of the United States in its Decision of April 11, 1944.

Respectfully submitted,
W. R. WALLACE, Jr.
Attorney for Appellant.

Service is hereby acknowledged of a copy of the foregoing this 5th day of July, 1945.

(Signed) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue [117]

[Endorsed]: T.C.U.S. Filed July 5, 1945.

[Title of Tax Court and Cause.]

DESIGNATION OF RECORD

To the Clerk of The Tax Court of the United States:

Appellant above named hereby designates as the portion of the record, proceedings and evidence to be contained in the record on appeal in the above matter the following, to-wit:

1. Petition of Appellant herein for redetermination of deficiency filed herein, together with exhibits thereto attached;
2. Answer of Appellee to said Petition;
3. Opinion promulgated February 12, 1945.
4. Transcript of Testimony in question and answer form taken and received before the Honorable Ernest H. Van Fossan, on September 20th,

1944, together with any and all exhibits offered and received at said hearing. [118]

Dated June 18th, 1945.

W. R. WALLACE, Jr.
Attorney for Appellant.

Service of a copy of the foregoing is hereby acknowledged this 5th day of July, 1945.

(Signed) J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue. [119]

[Endorsed]: T.C.U.S. Filed July 5, 1945.

[Title of Tax Court and Cause.]

CERTIFICATE

I, B. D. Gamble, clerk of The Tax Court of the United States do hereby certify that the foregoing pages, 1 to 119, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of The Tax Court of the United States, at Washington, in the District of Columbia, this 19th day of July, 1945.

(Seal) B. D. GAMBLE,
Clerk, The Tax Court of the United States.

[Endorsed]: No. 11115. United States Circuit Court of Appeals for the Ninth Circuit. American Box Shook Export Association, a Corporation, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of the Record. Upon Petition to Review a Decision of The Tax Court of the United States.

Filed August 3, 1945.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11115

AMERICAN BOX SHOOK EXPORT ASSOCIATION,

Appellant,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

DESIGNATION OF THE RECORD

The Appellant hereby designates the entire record as certified to the United States Circuit Court of Appeals for the Ninth Circuit as the record upon which it tends to rely.

Dated: San Francisco, California, August 8, 1945.

W. R. WALLACE,
Attorney for Appellant, American Box Shook Export Association.

[Endorsed]: Filed August 10, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

CONCISE STATEMENT OF THE POINTS UPON WHICH APPELLANT INTENDS TO RELY

I.

That an association, whether incorporated under specific statutes relating to non-profit cooperative associations, or otherwise, which does business with its members only under contracts with those members which preclude the possibility of profit to the association, is not subject to income or excess profits taxes as a matter of law.

II.

That a corporation, organized under the Webb Pomerene Act conducting no business except the sale of the products of its members in the export trade under contracts with its members which preclude the possibility of profit to the association, may properly withhold a portion of the sums realized from such sales in the export trade to cover the cost of doing such business and a reasonable reserve for contingencies and distribute all of the

balance of such realizations from such sales to its members without being liable for income or excess profits taxes, either upon such reserves or the sums so distributed to its members.

III.

That the payment by the association to its members of the sum of $7,559.11 during the year in question was not in the nature of a dividend, but was made under the contractual relationships between the association and its members and represented the payment by the association to its members of sums which belonged, not to the association, but to the members.

WILLIAMSON & WALLACE
Attorneys for Appellant

[Endorsed]: Filed Aug. 10, 1945. Paul P. O'Brien, Clerk.

No. 11,115

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN BOX SHOOK EXPORT ASSOCIATION (a corporation),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF OF PETITIONER ON REVIEW.

W. R. WALLACE, JR.,
W. R. RAY,
310 Sansome Street, San Francisco 4,
Attorneys for Petitioner.

WILLIAMSON & WALLACE,
310 Sansome Street, San Francisco 4,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO,

Subject Index

Table of Authorities Cited

Cases

Dictionaries

No. 11,115

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN BOX SHOOK EXPORT ASSOCIATION (a corporation),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF OF PETITIONER ON REVIEW.

JURISDICTION.

Taxpayer's Petition for Review herein involves the determination of a deficiency in income and excess profits taxes for taxpayer's fiscal year ended May 31, 1941 in the respective amounts of $1952.15 income tax deficiency and $1270.32 excess profits tax deficiency. (Record p. 19.) The Petition for Review is taken from the Decision of the Tax Court of the United States entered April 11, 1945. (R. p. 28.)

The case is brought to this Court by a Petition for Review filed July 5, 1945 (R. pp. 105-107, inc.), pursuant to the provisions of Sections 1141 and 1142 of the Internal Revenue Code.

OPINION BELOW.

The only previous opinion in this case is that of the Tax Court of the United States. (R. pp. 21-28, inc.)

STATEMENT OF THE CASE.

The petitioning taxpayer is an association organized under the general corporation laws of the State of California as a successor to an unincorporated association of the same name. The Association consists of 12 members, all of whom are engaged either in the manufacture or in the sale of box shook, or in both such manufacture and sale. The Association was organized under the provisions of the Webb-Pomerene Act to engage only in export trade. It purchased box shook only from its members and exported the box shook so purchased to its customers in foreign countries. All of its purchases of box shook from its members were made upon agreements which provided for the payment by the Association to the member of a minimum price and also provided that such sums as should be received by the taxpayer Association from the resale of the box shook in foreign trade after deducting the cost of doing business, including necessary reserves, should be returned to the members. In other words, the price the member received from the taxpayer Association for its box shook was the final amount received by the Association from its foreign customers less cost of resale. The arrangement between the Association and its members under which the Association acted as the export department of the

various members continued in effect without change from the inception of the organization to the date of the trial in the Tax Court, and the Association did not do any business on any other basis.

In its income tax return for the fiscal year ending May 31, 1941, the year here in question, the taxpayer reported a deduction of some $7599.11, which it had returned to its members during that fiscal year as additional payment for box shook theretofore purchased by it from its members and resold in foreign trade. It retained some thirteen thousand odd dollars as reserve against unforeseen contingencies which might result from the doing of business at long distances during the War. The Treasury Department and the Court below disallowed the deduction of the $7599.11 upon the theory that that payment constituted a dividend by the corporation to its members.

As stated in the Tax Court opinion, the fundamental issue is whether the Petitioner had any taxable income of its own or whether its income was actually at all times the income of its members.

In addition to this fundamental question, the following questions are presented for review:

1. The Tax Court, having found in its "Findings of Fact" that an agreement or understanding was in existence between the taxpayer and its members under which all sums received by the taxpayer Association from the resale of the products of its members, in excess of its business expenses and necessary reserves, were to be returned to the members, its Decision that

this fund was income of the taxpayer Association and not of the members and, therefore, subject to income tax is in violation of the rule that a decision must be supported by Findings of Fact and not be in contravention of the Findings of Fact.

2. The evidence will not support any Finding except that the purchase and sale agreements between the taxpayer Association and its members provided that all sums received by the taxpayer Association from the resale of the box shook purchased by it from its members, after deducting the cost of business, were to be returned to the members and, therefore, the Decision of the Tax Court must be reversed for the reason that it is not supported either by Findings of Fact or by evidence upon which necessary findings could be supported.

SPECIFICATION OF ERRORS RELIED UPON.

1. The Tax Court erred in that its Decision is without support in its Findings of Fact.

2. The Tax Court erred in that its Decision is without support in the evidence.

3. The Tax Court erred in that its Decision that the taxpayer Association was not bound by its purchase and sale agreement with its members is without support in the evidence or in the Findings of Fact.

4. The Tax Court erred in that its conclusions and its Decision are contrary and opposed to its Findings of Fact and to law.

SUMMARY OF THE ARGUMENT.

The questions presented are questions of law under the decision of the Supreme Court in *Dobson v. Commissioner,* 320 U. S. 489, and therefore the subject of review by this Court. (p. 5.)

The Decision of the Tax Court is not founded upon Findings of Fact, but is in opposition to and contrary to the only finding upon the subject. (p. 7.)

The evidence will not support any Finding except a Finding that the taxpayer Association was bound by its purchase and sale agreements with its members and that funds received by it in excess of its expenses were the income of its members and not of the taxpayer Association. (p. 16.)

The question, being one of ownership of property, the status of the property is determined by the law of the State of California. (p. 23.)

ARGUMENT.

THE QUESTIONS FOR REVIEW ARE QUESTIONS OF LAW AND NOT OF FACT.

This case arises on Petition for Review of a Decision of the Tax Court of the United States. In view of the decision of the Supreme Court in *Dobson v. Commissioner,* 320 U. S. 489, it may be well to establish that the questions in issue are questions of "law" and not of "fact" before proceeding with the argument.

As stated by the Tax Court in its opinion:

> "The fundamental issue before us is whether the petitioner had any taxable income of its own or whether its income was actually, at all times, the income of its members. In the event our determination of this issue is adverse to the petitioner a further issue arises, namely, whether the petitioner is entitled to a deduction in the amount of distributions made to its members on May 28, 1941." (R. p. 21.)

Earlier in the preface to its Findings of Fact, the Tax Court stated:

> "The principal issue now in controversy is whether any of the amounts received by the petitioner during the year in question are taxable to it as its income." (R. p. 19.)

The same Court found as a fact:

> "There is an understanding, however, between the petitioner and its members that any amounts received in excess of actual cost, with the exception of amounts placed in a reserve for anticipated claims, is to be returned to them." (R. p. 21.)

We may then state the question thus:

> In view of the contracts between the taxpayer Association and its members, did the sums received by the taxpayer in excess of actual cost belong to it or to its members,

or stated otherwise:

> Was the understanding which was found by the Tax Court as a "fact" a valid and enforceable agreement as a matter of law?

The Supreme Court in the *Dobson* case has, we believe, granted to the decisions of the Tax Court some measure of finality on questions of "fact". Its decision on such questions must have "warrant in the record" by which, we assume, the Court means that there must be evidence to support the findings. If there is, then the findings are apparently unassailable.

No such infallibility attaches to the Tax Court's decision on questions of law, for the Supreme Court says with reference to the Tax Court:

> "In deciding law questions courts may properly attach weight to the decision of points of law by an administrative body having special competence to deal with the subject matter." (Id., p. 502.)

The same may be said for the decisions of any inferior tribunal.

The only question here in issue is whether this taxpayer was bound by valid and enforceable agreements with its members. Surely, there could be no better example of a question of "law" which upon Petition for Review this Court may examine in the light of the evidence submitted.

THE DECISION OF THE TAX COURT IS NOT FOUNDED UPON FINDINGS OF FACT, BUT IS IN OPPOSITION TO AND CONTRARY TO THE ONLY FINDING UPON THE SUBJECT.

The Tax Court having found as a fact:

> "There is an understanding, however, between the petitioner and its members that any amounts

> received in excess of actual cost, with the exception of the amounts placed in a reserve for anticipated claims, is to be returned to them." (R. p. 21.)

its Conclusions of Law as stated in its Opinion to the effect that there was no such understanding are in exact opposition thereto.

In this discussion, it is assumed that the Tax Court is bound by its own Findings of Fact.

The Supreme Court has said:

> "In view of the division of functions between the Tax Court and the reviewing courts it is of course the duty of the Tax Court to distinguish with clarity between what it finds as fact and what conclusion it reaches on the law."
>
> *Dobson v. Commissioner,* 320 U. S. 489, 502.

The Tax Court has done so in the case at bar and has labeled its "Findings of Fact" as such.

It is elementary that the "conclusion it reaches on the law" must find support in the findings of fact for it is from the "facts" that the "conclusions" must be drawn.

In *Rodemeyer v. Meyer,* 30 Cal. App. 514, at 517, the Court states:

> "The court, however, failed to make any finding upon either of these issues; and for this reason the judgment must be reversed. The conclusion of law as found by the court, that plaintiff was not entitled to run water over the three-quarter-acre tract, cannot aid respondent on appeal for the

> reason there is no finding of fact upon which to base such conclusion;"

In *Schoolcraft v. B. O. Kendall Co.,* 108 Cal. App. 546, at 549, the Court states:

> "It is a rule of law that conclusions of law are binding to the extent only that they are supported by findings of fact."

Here the Tax Court found an understanding between the taxpayer and its members that *"any* amounts received in excess of actual cost, with the exception of amounts placed in a reserve for anticipated claims, is to be *returned* to them". (R. p. 21.) Clearly if the excess money were to be "returned" to the members, it was originally the members' money, held by the taxpayer not as its own but in a fiduciary capacity. One "returns" what one has borrowed. One does not "return" to a member money the member never owned.

"Return" is defined in Webster's Dictionary as:

> "Return. To bring, carry, put or send back, as to return a borrowed book or a hired horse; to repay, to give back."

The word "understanding" is that used by the laymen witnesses at the trial, who referred to the agreements of purchase and sale between the members and taxpayer Association at various times as "understanding" (R. pp. 57-107); as the "arrangement" (R. p. 101); as an "agreement" (R. p. 103); and as a "plan of operation". (R. p. 62.)

"Understanding" is defined in Webster's Dictionary as follows:

> "Understanding.—An agreement of opinion or feeling; an adjustment of differences; anything mutually understood or agreed upon; as, to come to an understanding with another. A mutual agreement not formally entered into but having definite engagements; as, an understanding between two nations."

and by Bouvier:

> "Understanding. It may denote an informal agreement or a concurrence as to its terms. *Barkow v. Sanger*, 47 Wis. 500, 3 N. W. 16. A valid contract engagement of a somewhat informal character. *Winslow v. Dakota Lumber Co.*, 32 Minn. 237, 20 N. W. 145."

"Arrangement" is defined by Webster as:

> "An agreement or settlement of details made in anticipation; as, arrangements for receiving company; settlement; adjustment by agreement; as, the parties made an arrangement of their disputes."

"Agreement" is defined as:

> "a concurrence in an engagement that something shall be done or omitted; an exchange of promises; mutual understanding, arrangement or stipulation."

Of these words so variously used, the Tax Court has chosen to refer only to use of the word "understanding".

In its Opinion the Court nowhere denies the existence of the agreements that the money of the members was to be returned to them: Its Decision is apparently based upon a conclusion that the agreement "was not carried out in practice". (R. p. 23.)

If this statement in the "Opinion" is a "conclusion on the law", it is based upon no "finding of fact" and is contrary to the only finding on the subject.

If the statement is looked upon as a "finding of fact" then it violates the Supreme Court's instruction to distinguish with clarity between the matters of fact and of opinion. But a more forceful objection may be made. A finding of fact must be based upon evidence. The only evidence on the point is:

> "A. We found we had received additional realization, a total of which represented—rather, the total of which that we felt might be distributed safely without hazard—or without depleting our reserve for additional cost would represent 50 cents a thousand board feet." (R. p. 62.)

In simpler words and with figures added for clarity:

> We had received $20,000 more than we had paid our members and decided that we could pay out $7000.00 of that sum without hazard and without depleting necessary reserves.

The Tax Court then recites that of the $20,967.77, which the taxpayer Association had on hand, after the payment of its expenses, at the end of the fiscal year (May 31, 1941), it returned $7559.11 to its members.

As to the balance of that money, that is $13,317.66, the Court states:

> "What disposition was to be made of this amount, we do not know. There is *nothing* in the record to show that it could not be used for the payment of dividends on the stock, or for any other purpose. Other than the amounts actually distributed to the members, of which we shall speak later, there is nothing to show that the petitioner's earnings were not its own which it could use for any ordinary corporate purpose." (R. p. 23.)

We may first point that this remark is diametrically opposed to the Tax Court's own Finding of Fact to the effect that *all* amounts received in excess of actual cost and necessary reserves were to be returned to the members. We may also remark that all of the evidence is to the effect that the money was to be returned to the members and that there is no evidence that the corporation could use it for any other purpose. In view of the Finding of Fact, it is difficult to say that the Tax Court overlooked or ignored the evidence, but nevertheless the statement is without support in the evidence; there is not only no evidence to support it, but it is diametrically opposed to all of the evidence on the subject.

After making the above quoted statement, the Tax Court discusses the case of *San Joaquin Valley Producers Assn. v. Commissioner*, 132 Fed. (2d) 382, a case decided by this Court, and then states with reference to the case at bar:

> "Here, however, as we have noted, neither the statute under which it was incorporated, its articles of incorporation, its by-laws *nor any other contract forbade the petitioner from having income of its own.* Under such circumstances, it can not be said that the petitioner's income was actually that of its members." (Italics ours.) (R. p. 25.)

The whole point at issue in the case from the inception thereof has been whether or not the taxpayer Association was bound by its purchase and sale contracts with its members; or, stated otherwise, whether those contracts were valid and enforceable. The agreements all provide that the sums received by the Petitioner in excess of cost of doing business were to be returned to the members. The Tax Court has recognized the existence of the agreements in its Finding of Fact and has nowhere found that the contracts were not valid and enforceable. The evidence shows that the affairs of the corporation were conducted in accordance with the provisions of those agreements from its inception to the date of the trial. We do not assume, in its reference to any *other* contract, that the Tax Court was referring to something not in the record as the only contracts pleaded and the only contracts in existence were the purchase and sale contracts between the Association and its members. The fact that they were of an informal character and that the entire business of the Association was so conducted makes them, nonetheless, valid and binding.

One other point deserves attention, and that is the stress laid by the Tax Court (p. 27 of the Record) upon a phrase which it has quoted from the testimony of the witness Hudson. The quotation is as follows:

> "Attention was further called to the fact that the Association had been set up as a non-profit organization with the understanding that any excess received from the sale of shook over expenses would, *upon action of the organization,* be subject to distribution as additional realization on shipments made during the period when such surplus was accumulated." (The italics are that of the Tax Court.)

In order that there could be no doubt as to the meaning of that phrase, Counsel for the respondent inquired of the witness Hudson as to its meaning and was answered in the following language:

> "I ask you, assuming you know, whether action was taken by this taxpayer organization in connection with all distributions made by the corporation?
>
> "A. Yes. I would say that the word 'action' may or may not be as definite as you have in mind.
>
> The Directors discussed the realization over a given period. Naturally there was a feeling there should be held back a cushion, or you might say a small revolving fund to take care of contingencies, and so it was just a matter of judgment as to whether we could safely distribute 50 cents or 75 cents or $1 a thousand additional in view of the returns to date, and that phrase there, 'upon action of the organization', referred to that policy, that it would be a matter of judgment to be de-

termined by the directors as to *how much of the additional realization might safely at that moment be paid against shipments.*" (Rep. pp. 81-82.) (Italics ours.)

Later and in answer to a further question, witness Hudson stated:

"I am sure that was understood to mean that the directors should approve of any additional realization, merely because it was a matter of judgment as to whether there were still some delayed liabilities which might dissipate some of that additional realization later." (R. p. 82.)

It will, of course, be admitted that the funds received from the sales by taxpayer Association in the export trade of the products it had theretofore received from its members would result in funds coming into the treasury of the taxpayer Association, and it would also seem to be clear that some action would have to be taken by the taxpayer Association in order that those funds could be transferred to the members to whom they belonged. It would also seem to be clear that there might be differences in judgment as to the amount of reserves that should be temporarily withheld pending settlement of claims or other expenses which might, and often do, result in shipment of goods during wartime.

In the case at bar, the directors obviously felt, as the evidence shows, that they should withhold some $13,000.00 odd dollars to cover any possible contingency in the shipments that had been made in the pre-

vious fiscal year and that sum was in addition to the $4000.00 already held in reserve. The balance of some $7000.00 odd dollars they felt could safely be distributed.

In so acting they were carrying out to the letter the agreements under which the Petitioner had purchased the box shook from its members.

We, therefore, respectfully submit that the Decision of the Tax Court must be reversed in view of the fact that its Conclusions and Decision are not supported by its Findings of Fact, but are opposed to its only Finding of Fact upon the question in issue.

THE EVIDENCE WILL NOT SUPPORT ANY FINDING EXCEPT A FINDING THAT THE TAXPAYER MADE VALID AND ENFORCEABLE AGREEMENTS WITH EACH AND ALL OF ITS MEMBERS; THAT ALL SUMS RECEIVED BY IT IN THE COURSE OF ITS BUSINESS, AND NOT NECESSARY FOR ITS ACTUAL EXPENSES OF DOING BUSINESS AND NECESSARY RESERVES, WERE TO BE RETURNED TO ITS MEMBERS, AND ANY OTHER FINDING OR CONCLUSION IS WITHOUT SUPPORT IN THE EVIDENCE.

The Tax Court has found that the Petitioner was organized in 1940 to succeed an unincorporated corporation of the same name, which, in turn, was organized in 1935. As to that fact the witness Hudson testified as follows:

> "My proposal to members of this industry when we set up the organization in 1935 was that this would be a service organization, actually just an export department of their own firms. There

would be no profits accrue. It would be operated merely on the basis of meeting its own expenses so far as possible during the first thirty months of the organization." (R. p. 48.)

At page 51 of the Record, witness Hudson read the following statement, which was quoted from the Minutes of a Meeting held July 29, 1940:

"Attention was further called to the fact that the Association had been set up as a non-profit organization, with the understanding that any excess received from the sale of shook over expenses would, upon action of the organization, be subject to distribution as additional realization on shipments made during the period when such surplus was accumulated."

The witness was thereafter asked:

"Q. Mr. Hudson, do either of the statements you have read reflect the understanding you have just testified to?

A. The second statement (the last one quoted above) reflects the understanding we have had and do have at the present time with our members." (R. p. 57.)

"Q. Under the date of July 29, 1940, or previous thereto, or when?

A. It accurately reflects the understanding I have had from the very beginning of this project, whether unincorporated or incorporated." (R. p. 57.)

With respect to the distribution of the $7559.11 to the members in 1941 and which was claimed by the

taxpayers as a deduction on its income tax return, the witness Hudson testified as follows:

> "We found we had received additional realization, a total of which represented—rather the total of which that we felt might be distributed safely without hazard—or without depleting our reserve for additional cost would represent 50 cents a thousand board feet." (R. p. 62.)

Thereafter the witness was asked:

> "Q. Now, Mr. Hudson, was the same plan of operation to which you have testified the same arrangement with your members carried on throughout the fiscal year June 1, 1940, to May 31, 1941?
> A. Yes.
> Q. And have you continued to operate under that plan since?
> A. We have." (R. pp. 62-63.)

Upon cross-examination of the witness Hudson, Counsel for the respondent quoted from a questionnaire, attached to the income tax return, the following statement:

> "It is intended that a preliminary price be settled monthly with the understanding that any excess received from the sale of shook over expenses would, upon action of the organization, be subject to distribution as additional realization on shipments made during the period when such excess was accumulated.
> Q. I ask you, assuming you know, whether action was taken by this taxpayer organization in connection with all distributions made by the corporation?

A. Yes. I would say that the word 'action' may or may not be as definite as you have in mind.

The directors discussed the realization over a given period. Naturally there was a feeling there should be held back a cushion, or you might say a small revolving fund to take care of contingencies, and so it was just a matter of judgment as to whether we could safely distribute 50 cents or 75 cents or $1 a thousand additional in view of the returns to date, and that phrase there, 'upon action of the organization', referred to that policy, that it would be a matter of judgment to be determined by the directors as to how much of the additional realization might safely at that moment be paid against shipments.

Q. Well, then, it was necessary, and that necessity was recognized in connection with every distribution, that the directors act in accordance with it, is that right?

A. That the directors more or less approve the distribution.

Q. Well, they had to approve it before it was made, of course?

A. That's right.

Q. And that was necessary to their plan?

A. Well, the phrase occurs in there, 'upon action of the organization'. It occurs in the minutes, I believe of July, that we read, and in that statement carried on the questionnaire, that phrase occurs, and I am sure that was understood to mean that the directors should approve of any additional realization, merely because it was a matter of judgment as to whether there were still some delayed liabilities which might dissipate some of that additional realization later." (R. pp. 81-83, inc.)

Such is the testimony of the principal witness, the General Manager of the taxpayer Association, and there is no evidence of any kind in the Record which in any manner opposes or disputes the accuracy of the testimony of that witness.

Two other witnesses were called. Both of those witnesses were directors of the taxpayer Association and each of them was an official of a member corporation.

The first of those witnesses was Mr. J. F. O'Brien, the General Manager of the California Pine Box Distributors, a cooperative selling organization. His testimony is as follows:

> "Q. Now, Mr. O'Brien, this arrangement that you have testified to, under which your California Pine Box Distributors Association sold lumber to American Box Shook Export Association, did that preliminary billing price arrangement continue throughout this fiscal year of June 1, 1940, to May 31, 1941?
> A. Yes, sir.
> Q. Has it continued since?
> A. Yes, sir.
> Q. Has there been any change?
> A. We have never made a sale except with the understanding that it is preliminary, that any additional realization is ours.
> Mr. Wallace. That is all.
> Mr. Murray. No questions.
> The Court. You are excused."
> (Witness excused.) (R. p. 101.)

Mr. J. W. Rodgers, President of the Western Box Distributors and Vice President of the Lassen Lumber & Box Company, testified as follows:

"Q. Did you have any agreements or understanding with the American Box Shook Export Association as to the terms of those sales?
A. Mr. Hudson would indicate a price that he could afford to pay us. Sometimes it was agreeable to us, and sometimes it wasn't. He would tell us that there was a ceiling price, and any additional realization we would naturally participate in, that amount being uncertain, all depending on what his overhead was and his claims, and everything connected with the Export Association.
Q. Did that arrangement continue throughout this fiscal year?
A. Well, it was our understanding from the outset that that was the arrangement.
Q. Has there been any variation in that arrangement from the time you became a member to this moment?
A. Only in the matter of realization we got.
Q. You mean only in the matter of the amount?
A. The matter of the amount of realization that we got. The amounts varied from year to year, depending on the volume handled." (R. pp. 103-4.)

To say in the face of this evidence, and there is no other evidence, that "there is nothing to show that the petitioner's earnings were not its own which it could use for any ordinary corporate purpose" is to make a statement diametrically opposite to all of the evidence and without any support in the evidence. It was the position of the taxpayer before the Bureau of Internal Revenue, before the Tax Court, and is the taxpayer's position here that it was bound by valid and enforceable agreements with its members.

Let us assume that instead of as a tax case, the case at bar arose upon the claim of one of the members for its proportionate share of money held by the taxpayer, in excess of its actual expenses and necessary reserves, and not distributed. Then let us summarize the evidence. The General Manager of the taxpayer has testified that he originally organized the Association to be nothing more or less than an export department for the various corporations and associations which were members thereof. He explained that at that time each of the members was assessed an amount sufficient to cover the expenses of the Association. By 1940 this manner of operation had become too cumbersome. In view of the then difficulties of world trade, a corporation was organized under the provisions of the Webb-Pomerene Act to engage only in the export trade. The General Manager of the new corporation explained to all of the members that the association would operate upon a plan under which it purchased box shook only from its members and only for export. It would pay its members a minimum price, would then attempt to sell the product so purchased from its members to foreign buyers and would add sufficiently to the price to cover its expenses and a little more. If after paying its expenses, paying claims and other similar charges any funds were left over, they were to be returned to the members. Once each year the members were to meet, look over the financial accounts and determine what amount of the excess could safely then be returned to the members. The General Manager and the members testified that that arrangement had been car-

ried out from the inception of the corporation to the date of the trial. We believe no Court would state upon that evidence that the excess earnings belonged to the Association and not to its members, or would state that "there is nothing to show that petitioner's earnings were not its own, which it could use for any ordinary corporate purpose".

LEGAL PRINCIPLES INVOLVED.

Since the decision of this Court in the case of *San Joaquin Poultry Producers Association v. Commissioner,* 136 Fed. (2d) 382, the rule that non-profit business associations, conducted for the benefit of members thereof, were not taxable and that the sums held by such corporations or associations in reserve, or otherwise, belonged, not to the association, but to the members thereof, has been settled.

The fact that the Poultry Producers Association was organized under the provisions of the Agricultural Code of the State of California and that its By-Laws contained provisions clearly indicating the fiduciary capacity of the Association led to further litigation between the Commissioner and actual non-profit associations which were not so organized. One of these cases was that of *United Cooperatives, Inc., v. Commissioner,* which was decided by the Tax Court on September 29, 1944, and is reported in Volume 4 of Tax Court Decisions. In that case, the cooperative was organized under the general corporation act of In-

diana and the by-laws provided for the setting up of reserves and also provided that the directors might declare dividends of not in excess of 8% of the par value of the stock. During the year in question the Directors declared no dividends, but the net income of the corporation was refunded to its members ratably in what were referred to as "patronage dividends". The Tax Court properly held that the form of the corporation was of no consequence; that the so-called "patronage dividends" were simply the return of funds to the members of the association to which they were entitled and that whether they were called "patronage dividends" or "rebates", made no difference.

The crucial question in this case, as it was originally stated by the Commissioner of Internal Revenue, was whether or not there was a binding obligation upon the taxpayer to return the excess funds to its members. (R. p. 11.) If there was such an agreement, then the excess income belonged to the members and not to the association. The question of whether or not there was a binding agreement was a question of law and not of fact. All of the witnesses testified there was such an agreement, and there is no evidence to the contrary.

In the closing paragraph of its Opinion, the Tax Court states:

> "The taxpayer points to no statute authorizing the claimed deductions. Clearly they are not deductible expenses. The petitioner was under no obligation to make distribution to its members until the board of directors had so acted. Whether

> the payments were in the nature of dividends we need not decide. But see *Fontana Power Co.*, 43 B.T.A. 1090, affirmed 127 Fed. (2d) 193; *Juneau Dairies, Inc.*, 44 B.T.A. 759. We are of the opinion that the petitioner is not entitled to the deduction in any event and that the respondent's determination must be sustained."

The answer is simple: Whose money was it? If it belonged to the members then the members, not the association, should pay the taxes. If it belonged to the members, it was their 'income', not that of the Association.

That the Board of Directors made up only of the representatives of members reserved to itself the right to insure that all possible bills were paid before distribution of the surplus fund does not mean that the Association could withhold payment of its members' money any more than a stockbroker could keep for himself the funds he received from the sale of his clients' stock. He has a right to deduct his proper charges and the balance he must remit.

The *Fontana Power* case (127 Fed. (2d) 193) and the *Juneau Dairies* case, 44 B.T.A. 759, are neither of them in point.

In the *Fontana* case, the point in issue was whether certain payments were deductible as "interest" or were in fact "dividends". This Court held the payments were not interest on an "indebtedness", and, therefore, not deductible. No such question arises here. Our question is: "Was the money held by the Association

due to its members as payment for box shook purchased by the association from its members?".

The *Juneau Dairies* case was decided by the Board of Tax Appeals nearly two years before the decision of this Court in the *San Joaquin Valley Poultry Producers* case and turns upon the fact that the Dairies corporation dealt both with members and non-members, but distributed its "profits" only to members.

The points raised by the Tax Court in the final paragraph of its Opinion have been the subject of substantial litigation in the State of California. The original payment of a minimum price for the member's goods, the withholding of reserves and the necessity for "action by the organization" before distribution have all been litigated. A good example of such litigation is the case of *Mountain View Walnut Growers Assn. v. California Walnut Growers Assn.*, 19 Cal. App. (2d) 227, decided in February of 1937. The question in that case was as to the actual ownership of funds withheld as reserves, in an identical manner and under identical circumstances to the case at Bar. The Walnut Growers Association had purchased the walnuts from its members and had resold them under an agreement in which they were first to deduct their expenses, plus a reasonable sum for reserves, and pay the balance over to the members. The Court held, and properly so, that the reserve fund was a trust fund and had always been treated as such; that the fund was held for the benefit of the members and that they should receive it after it had served its purpose because at all times it

was their property under their agreement with the selling association.

Since *U. S. v. Robbins,* 269 U. S. 315, there has been no doubt but that the local law on questions of ownership of property governs in the Federal Court. This doctrine was reaffirmed in *Poe v. Seaborn,* 282 U. S. 101, where at page 110, Mr. Justice Roberts, delivering the opinion of the Court, states:

> "The Commissioner concedes that the answer to the question involved in the case must be found in the provisions of the law of the state, as to a wife's ownership of or interest in the community property. What, then, is the law of Washington as to ownership of community property and of community income including the earnings of the husband's and wife's labor?
>
> The answer is found in the statutes of the state, and the decisions interpreting them."

We respectfully submit that under the laws of the State of California and the decisions interpreting those laws there can be no question but that the taxpayer Association, a California corporation, is bound by the terms of its contracts of purchase and sale and the funds, in excess of its costs, resulting from the resale by the taxpayer Association of the products theretofore purchased by it from its members must be returned to those members.

The sums in question in this case were the property not of the Petitioner but of its members and the Petitioner Association was not therefore subject to the payment of income tax thereon.

We respectfully submit that the Decision of the Tax Court of the United States should be reversed.

Dated, San Francisco,
October 29, 1945.

W. R. WALLACE, JR.,
W. R. RAY,
Attorneys for Petitioner.

WILLIAMSON & WALLACE,
Of Counsel.

No. 11115

In the United States Circuit Court of Appeals for the Ninth Circuit

AMERICAN BOX SHOOK EXPORT ASSOCIATION, A CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
ROBERT N. ANDERSON,
LOUISE FOSTER,
Special Assistants to the Attorney General.

INDEX

CITATIONS

675334—45——1

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11115

AMERICAN BOX SHOOK EXPORT ASSOCIATION, A CORPORATION, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF THE DECISION OF THE TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 19–28) are reported at 4 T. C. 758.

JURISDICTION

This petition for review involves income and excess profits taxes for the fiscal year ended May 31, 1941, in the respective amounts of $1,952.15 and $1,270.32. (R. 105–107.) On December 9, 1942, the Commissioner of Internal Revenue mailed a notice of deficiency to the taxpayer. (R. 8–9.) Within 90 days thereafter, i. e., on February 17, 1943, the taxpayer filed its petition with the Tax Court for redetermination of the deficiencies under Section 272 of

the Internal Revenue Code. (R. 1, 3–8.) The Tax Court entered its decision on April 11, 1945, finding deficiencies in the amounts stated above. (R. 28–29.) The petition for review by this Court was filed on July 5, 1945 (R. 105–107), pursuant to the provisions of Sections 1141–1142 of the Internal Revenue Code.

QUESTION PRESENTED

Whether Section 22 of the Internal Revenue Code requires the taxpayer to report the income which it received in the taxable year as its gross income and, if so, whether sums it distributed to its member associations may be deducted therefrom in computing its net taxable income.

STATUTE INVOLVED

Internal Revenue Code:

> SEC. 22. GROSS INCOME.
>
> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *
>
> * * * *
>
> (26 U. S. C. 1940 ed., Sec. 22.)

STATEMENT

The facts as found by the Tax Court are as follows:

The taxpayer is a corporation organized on March 26, 1940, under the general corporation laws of the State of California. Its tax returns for the year involved were prepared on the accrual basis. The taxpayer was organized to succeed an unincorporated association of the same name, which was organized in 1935. (R. 19.)

The taxpayer is a sales organization engaged in the purchase of box shook, i. e., unassembled parts of wooden boxes, exclusively for export purposes. During the fiscal year ended May 31, 1941, the year in controversy, it purchased shook from its member-stockholders only. It has twelve such members, all of which are associations engaged either in the manufacture or distribution of lumber products, or both. The shook so purchased by the taxpayer was sold by it to its customers in foreign countries. It does not make purchases from its members upon any standard rate or price basis. When an order for shook is placed by a foreign customer, the taxpayer first obtains the necessary data from the customer, including information as to specifications, shipping schedule and quantity. It then contacts its members to ascertain the "minimum satisfactory price" at which the members would agree to handle the particular order. (R. 19–20.)

These negotiations with the members usually are not reduced to writing. The taxpayer conducts its business with its members in an informal manner,

much of it being handled by telephone. After it obtains the minimum price at which the members will produce the shook, the taxpayer endeavors to secure a higher price from the customer. This usually amounts to an additional margin of from 8 percent to 10 percent of the original "minimum" price. It is added to provide against unforeseen items of expense. (R. 20.)

The members bill the taxpayer for shook sold on the basis of the "minimum" price and it settles with them currently on the basis at a discount. This is done since the final profit from the transaction cannot be determined for some time owing to the distances which the products must travel and the unforeseen expenses which may arise. (R. 20.)

Neither the articles of incorporation nor the by-laws of the taxpayer require that amounts received by it in excess of the cost of the goods sold be distributed to its members upon any patronage basis but there is an understanding between the taxpayer and its members that any amounts received in excess of actual cost, with the exception of amounts placed in a reserve for anticipated claims, is to be returned to them. (R. 20–21.)

At the close of the fiscal year the directors determined the amount of profits which could be distributed without endangering the reserve fund. These amounts were distributed to the members upon the basis of the amount of board feet of shook which each shipped during the year. On or about May 28, 1941, it made distributions to its members out of earnings of that year in the amount of $7,559.11. (R. 21.)

In its income tax return the taxpayer reported total income of $50,865.03 and net taxable income of $13,-317.66. It did not include in its gross income either the amounts distributed to the members during that year nor the sum of $4,000 entered in its books as a reserve for anticipated claims. At the hearing it conceded the non-deductibility of the latter item if it is determined that it is taxable. (R. 21.)

The Tax Court held (1) that the income received by the taxpayer was not the income of its members, and (2) that sums which it distributed to the members during the taxable year were not deductible from gross income. Accordingly it decided that there are deficiencies in income tax and excess profits tax in the respective amounts of $1,952.15 and $1,270.32. (R. 28.)

SUMMARY OF ARGUMENT

The Tax Court correctly held that all income received by the taxpayer during the taxable year belonged to it and that no deductions could be made on account of sums distributed by it to its members. In contending otherwise, the taxpayer asserts that all of its net income belonged to its members. However, it does not now seek to have any portion of such income held tax exempt except the sums distributed to its members, and in seeking this privilege it does not rely on any specific provision of the revenue statutes. Instead it relies entirely on an "understanding" which it claims to have had with its members to the effect that it would distribute all profits in excess of expenses. The Tax Court found that there was such an understanding but held that, since it was merely an

informal arrangement not contained in any express written contract or in the articles of incorporation or by-laws, such understanding did not amount to the fixed liability required before a taxpayer may be relieved of tax on sums distributed. The Tax Court's conclusion is also supported by the evidence showing that no distributions were or could be made without action by the directors, that there was nothing to prevent the taxpayer's directors from voting regular dividends on stock, that the taxpayer had not adhered to the understanding in practice, that it was organized under the general corporation law of California rather than under the statutes providing for cooperative associations, and that it intended to and had engaged in the exporting trade for a profit, as any other business corporation would have done. Accordingly, the Tax Court's decision is amply supported by the evidence, and is a correct interpretation of the law.

ARGUMENT

The taxpayer is subject to tax on the income which it received during the taxable year and is not entitled to deduct amounts distributed to its members during that year

The Tax Court held that all of the income which the taxpayer received during the taxable year belonged to it and was subject to tax, and that sums distributed to the taxpayer's members were not deductible in computing its net taxable income. (R. 25–28.)

In contending otherwise, the taxpayer takes the position that all of the income which it received, in excess of expenses, belonged to its members. From this it might be inferred that the taxpayer is ask-

ing to be classified as an exempt corporation or at least is contending that all of its income during the taxable year was tax exempt, but that is not the case. Thus, in order to clarify the issue, attention is called at the outset to the fact that the taxpayer does not claim to be entirely tax exempt. It filed an income tax return for the taxable year reporting $13,317.66 as its net taxable income. Moreover, when the Commissioner determined a deficiency because the taxpayer had not included in its gross income the sum of $7,559.11, which it distributed to its members, and the sum of $4,000 held as a reserve for anticipated claims, it petitioned the Tax Court only for a redetermination of such deficiency[1] (R. 3–10) and has never claimed any overpayment because of the income originally reported. Later, at the hearing, counsel for the taxpayer admitted that the $4,000 reserve fund should be included in its taxable income, if it is held to be a taxable corporation. (R. 21.) From this, it is of course evident that, notwithstanding the taxpayer's assertion that all of the net income belongs to its members, the only amount which it actually seeks to have excluded is that dis-

[1] The Commissioner asked the Tax Court to rule that the issue as to whether the taxpayer had any taxable income was not properly raised in the petition and contended that it should not be considered but the Tax Court did not choose to rest its decision on the defect in the pleadings. Accordingly, while we think the issue should have been limited to how to treat the sums distributed to the members, in view of the Tax Court's decision we have included both issues in our statement of the question and in our argument.

675334—45——2

tributed to the members during the taxable year, and there can now be no question as to the taxpayer's liability for tax on the income which it originally reported on its tax return.

The taxpayer will also admit that in seeking to have the sum of $7,559.11 excluded or deducted from its gross income, it is not relying on any specific provision of the revenue laws. Section 101 of the Internal Revenue Code sets forth the corporations which are tax exempt, Section 22 provides for certain exclusions from gross income and Section 23 covers deductions therefrom, but the taxpayer does not and cannot claim that any of these statutory provisions are applicable or allow it to secure the privilege it seeks. Instead the taxpayer relies entirely on "an understanding" which the taxpayer had with its members, and asserts that, because of such understanding, all of the income which it received in excess of expenses belonged to its members and should be free of tax in its hands, at least to the extent that the income was distributed during the taxable year to the members.

In some cases, such as *San Joaquin V. P. Producers' Ass'n* v. *Commissioner,* 136 F. 2d 382 (C. C. A. 9th), taxpayers have been granted tax exemption or partial exemption because of an agreement with persons with whom they have dealt that the net income shall belong to the latter. However, as we shall point out more fully below, these cases are distinguishable from the instant case in several respects, the most important being that they have involved valid legal

obligations in existence prior to the earning of the profits.

In attempting to show that there was a legally enforceable agreement here, counsel for the taxpayer points to the finding of the Tax Court that there was an understanding between the taxpayer and its members that any amounts received in excess of actual cost and necessary reserves were to be returned to the members. (R. 21.) Counsel then mistakenly assumes that the word "understanding" is necessarily synonymous with the term "valid, legal obligation", and have even stated (Br. 13) that the Tax Court "nowhere found that the contracts were not valid and enforceable." But counsel are in error. The Tax Court stated twice in its opinion (R. 23, 26), that "the understanding" here was not such a legal obligation as would support the taxpayer's contention that its net income belonged to its members. In this connection, the Tax Court discussed the evidence fully and showed how its conclusion was based on, and in complete accord with, the evidence.

In considering this matter, the Tax Court first pointed out (R. 22–23) that in order to be a true cooperative (and so be exempt from tax on income received) the taxpayer must have a legal obligation to pay over all funds received in excess of cost to the producers, and that such an obligation may arise (1) from the association's articles of incorporation, (2) from its by-laws, or (3) from some other contract. The Tax Court then stated unequivocably that it found no evidence of such a legal obligation here.

(R. 23.) After pointing out that the taxpayer was organized under the general corporation law of California, rather than the statutes providing for cooperative associations, that neither its articles of incorporation nor by-laws required distribution of profits to its members, and that there was no express written contract to that effect, it referred to the "understanding" which the taxpayer had with its members and stated that such understanding was not carried out in practice. Then returning to the question of whether the understanding was the kind of obligation which would support the taxpayer's contention here, the Tax Court emphasized its first statement by again stating (R. 26):

> * * * there was nothing in the petitioner's articles of incorporation or by-laws imposing upon it the obligation to distribute its excess revenue among its members. The question is, therefore, narrowed to whether or not such an obligation existed because of some other contract or contracts between the petitioner and its members.
>
> The petitioner contends that such a contract existed by virtue of the "understanding" between the petitioner and its members that they were to receive all the profits in excess of cost and the additions to the reserve. This contention is not borne out by the evidence. The testimony shows that it had originally been contemplated that excess revenue should be distributed by way of dividends on the stock. At a meeting of the stockholders, held May 6, 1940, a motion was made that the by-laws be amended to effect the distribution of excess revenue among the members upon the basis of

> the dollar value of shipments made by each member. This amendment was never put into effect. It was finally decided that the basis for distribution, proposed in the motion, was not practicable and that "the only fair method of distribution" was upon the basis of board feet of shook shipped by each member. However, no formal action in this regard was ever taken.

From this, it is evident that since the by-laws were not amended, dividends could have been voted on the stock as in the case of any business corporation. Indeed the taxpayer was an ordinary business corporation. It was not only organized under the general corporation law of California for the purpose of carrying on an exporting business, but it carried on such business in the way that any company would do when endeavoring to realize profits. And it did do a profitable business, At the end of the taxable year here, it had net income in the amount of $13,-317.66 in addition to the $4,000 reserve fund which it had set aside and also in addition to the amount which it had distributed to its members. The Tax Court pointed out (R. 23) that there was nothing to indicate what disposition was to be made of such income but it properly concluded that the net income could be used for payment of dividends on the stock or for any other corporate purpose. Counsel for the taxpayer, while denying that this could be done, make no comment in their brief on the failure of the taxpayer's directors to amend the by-laws so as to prevent payment of dividends in the customary

way. As to the testimony relative to the failure to make such amendment see record (pp. 50–51, 85).

There is another significant piece of evidence which the Tax Court also refers to (R. 26–27), and that is the fact that no amounts were distributable to the taxpayer's members without prior action on the part of the taxpayer's board of directors. This is of special importance because it shows that "the understanding" on which the taxpayer relied was of no effect without action by the directors. The taxpayer attempts to explain this by stating that the action of the directors was merely to determine how much of the profits should be distributed but the Tax Court did not so hold and the evidence indicates otherwise.

In the taxpayer's minutes of July 29, 1940, reference is made to the understanding that any excess income is to be distributed to the members "upon action of the organization." (R. 51.) These minutes were offered as written evidence of "the understanding." (R. 52.) Earlier, in answer to a questionnaire submitted by the Treasury Department, the taxpayer had also stated that "upon action of the organization" the excess would be distributed to its members. (R. 73–74.) Even the taxpayer's manager, in attempting to put the matter in as favorable light as possible for the taxpayer, admitted that action was always taken by the directors before every distribution and that they had to approve a distribution before it could be made. (R. 81–82.)

We submit that the evidence here amply supports the Tax Court's conclusion that the understanding

which the taxpayer had with its members was not sufficient to exempt it from taxation either entirely or on the sums distributed to its members. Accordingly this case is clearly distinguishable from *San Joaquin V. P. Producers' Ass'n* v. *Commissioner, supra.* In that case the taxpayer was organized under the Agricultural Code of California, which provides that associations organized thereunder shall be deemed non-profit. Here, as stated, the taxpayer was organized under the general corporation law and although it is claimed that the taxpayer was intended to be a non-profit organization, its application for a permit to issue shares of capital stock did not refer to its alleged non-profit purpose but stated instead that the taxpayer proposed "to transact business by purchasing box shook exclusive for export." (R. 86–87.)

Furthermore, in the *San Joaquin* case, the taxpayer's articles of incorporation provided that it should conduct and carry on its business without profit to itself and its by-laws also stated that it was organized as a non-profit cooperative association and that any net proceeds should belong to the members. Also, it was the practice of the taxpayer in that case to prorate and credit all net income, including that retained by the company, to the individual members. Consequently, this Court correctly held there that the net income, received by the taxpayer, whether distributed or not, belonged to its members and was not taxable to the association. But here, as we have already pointed out, the articles of incorporation and the by-laws were different, and there was no crediting of in-

come to the members nor any other action which would indicate that the income actually belonged to the members when received by the taxpayer.

Counsel for the taxpayer also cite (Br. 23) *United Cooperatives, Inc.* v. *Commissioner,* 4 T. C. 93, a case decided several months before the decision of the Tax Court in the instant case. Thus, if there is a conflict, the decision here, being later, should be taken as indicative of the Tax Court's interpretation of the law. However, it will be seen that the facts there are distinguishable in that the association in that case, although also organized under a general corporation law, had by-laws which required patronage dividends. The same distinction will be found in other similar cases. Thus it will be seen in all cases where the net income of cooperative associations has been held to be tax exempt or, where sums distributed by such associations as patronage dividends have been held to be deductible, there have been definite provisions in the by-laws or articles of incorporation requiring payment of such net income to the members or producers. Other factors may also be considered but to secure any tax exemption in such cases it is absolutely essential that there always be a fixed liability to distribute net profits and such liability must be in existence prior to the earning of such profits. *Cf. Co-operative Oil Ass'n* v. *Commissioner,* 115 F. 2d 666 (C. C. A. 9th); *Farmers Union Co-Op. Co.* v. *Commissioner,* 90 F. 2d 488 (C. C. A. 8th); *Farmers Union Cooperative S. Co.* v. *United States,* 25 F. Supp. 93 (C. Cls.). And it will be seen that in these cases the liability was fixed by the articles of incorporation or by-laws or both.

In the instant case, instead of there being a provision either in the articles of incorporation or the by-laws for distributions to patrons or for distribution on the basis of production there was nothing but an informal understanding which, as the Tax Court properly held, was not the legal obligation required. Actually such understanding, if it can be given any effect at all, is merely an arrangement for the payment of dividends to stockholders but not in proportion to the stock held. As all who received the distribution were stockholders, there was nothing objectionable about it, but the fact remains that the distribution was merely a payment in the nature of a dividend to stockholders and such payments are not deductible as ordinary and necessary expenses or for any other reason. *Cf. Cleveland Shopping News Co.* v. *Routzahan,* 89 F. 2d 902 (C. C. A. 6th).

In view of the taxpayer's references to the nature of the question here (Br. 7–23), we also wish to add that we agree with counsel that the question of whether the taxpayer was bound by any valid and enforceable agreement is one of law. However, counsel are in error in asserting (Br. 8) that the Tax Court's conclusions of law are contrary to its findings of fact that the taxpayer had an understanding with its members about net profits. As we have already pointed out, although the Tax Court did find that there was such an understanding, it held that this understanding was not the kind of agreement or obligation which is required in order for a taxpayer to be tax exempt. In interpreting this understanding and in reaching its conclusion, the Tax Court discussed various state-

ments in the evidence which show what action could be and had been taken by the taxpayer's board of directors and manager. (R. 23, 26–27.) Thus the basis for its conclusion or ultimate findings of fact is clear and there is ample evidence supporting such conclusion.

Apparently, the counsel for taxpayer object because some of the evidence which the Tax Court referred to in its opinion (R. 26–27) was not also set out under "Findings of Fact" but the references of the Tax Court are clearly to the facts and as these facts were taken from the evidence introduced by the taxpayer they cannot be disputed. Thus, while the Tax Court's decision can be sustained without these facts, we see no reason why they cannot be considered here as findings of the Tax Court. As this Court held in *California Iron Yards Co.* v. *Commissioner,* 47 F. 2d 514, the appellate court may consider findings of fact which are given in the opinion.

CONCLUSION

The decision of the Tax Court is correct and should be affirmed.

Respectfully submitted.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
ROBERT N. ANDERSON,
LOUISE FOSTER,
Special Assistants to the Attorney General.

NOVEMBER 1945.

U. S. GOVERNMENT PRINTING OFFICE: 1945

No. 11,115

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN BOX SHOOK EXPORT ASSOCIATION (a corporation),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF OF PETITIONER ON REVIEW.

W. R. WALLACE, JR.,
W. R. RAY,
310 Sansome Street, San Francisco 4,
Attorneys for Petitioner.

WILLIAMSON & WALLACE,
310 Sansome Street, San Francisco 4,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

No. 11,115

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

AMERICAN BOX SHOOK EXPORT ASSOCIATION (a corporation),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

REPLY BRIEF OF PETITIONER ON REVIEW.

THE JURISDICTION OF THIS COURT IS ADMITTED.

The Brief heretofore filed by respondent clarifies the issues at least to the extent that the respondent states his agreement that the question presented to this Court is one of law (Res. Brief, p. 15), and, therefore, a question upon which the jurisdiction of this Court is unquestioned.

THE QUESTION FOR DETERMINATION BY THIS COURT IS: DOES A FULLY EXECUTED ORAL AGREEMENT FOR THE PURCHASE AND SALE OF COMMODITIES CONTAINING A PROVISION THAT A PORTION OF THE PURCHASE PRICE SHALL BE PAID AFTER RESALE OF THE COMMODITIES BY THE PURCHASER CONSTITUTE A VALID AND ENFORCEABLE AGREEMENT AND THEREFORE A FIXED LIABILITY OF THE PURCHASER?

There is no dispute between the parties as to the primary question, that question being: "Were the contracts between the Association and its members valid and enforceable agreements as the taxpayer asserts, or mere unenforceable 'arrangements,' as is the position of the respondent?"

In its Statement, on page 4 of Respondent's Brief, the respondent restates the fact of the existence of "an understanding between the taxpayer and its members that any amounts received in excess of actual cost, with the exception of amounts placed in reserve for anticipated claims is to be returned to them".

Respondent argues that the agreements between the taxpayer and its members were not a "fixed liability" of the taxpayer. To quote the respondent's own language, the respondent states, at the bottom of page 5 and the top of page 6 of its Brief, that the Tax Court found that there was such an understanding, but held that "since it was merely an informal arrangement not contained in any express written contract or in the articles of incorporation or by-laws, such understanding did not amount to the fixed liability required before a taxpayer may be relieved of tax on sums distributed".

The question then may be restated:

> Did the executed oral agreements between petitioner and its members create "a fixed liability" on the petitioner association to return to its members all sums received by it in excess of costs of operation?

Considering for a moment the statement of respondent, it would seem clear that a valid and enforceable agreement need not be contained in an express written contract, nor does its enforceability or validity depend upon its inclusion within articles of incorporation or by-laws. It is true that a contract may be expressed in writing and may be contained in articles of incorporation or by-laws, but a contract need not be so expressed.

It may be a slight over simplification to say that the case at Bar results from the tax collector's natural prejudice against oral agreements, yet the whole burden of the respondent's argument is, to use his own language, that there was not "an express written contract". The witnesses for Petitioner referred to the terms of the purchase and sales contracts between Petitioner and its members variously as "an understanding", "an arrangement", "an agreement" and as "a plan of operation". The Tax Court referred to it only as an "understanding", though the respondent in his Brief also uses the word "arrangement". Whatever term may be used to denote the agreement, the evidence of the terms of the agreement is clear and includes a written memorandum sufficient to indicate the general terms of the agreement. That there is no dispute as to the terms of the agreement is made clear from the Tax Court's own Finding of Fact. The

memorandum contains one phrase "upon action of the organization" which is not quite clear and therefore is subject to explanation. The meaning of that somewhat ambiguous phrase was made clear by the testimony. There were then all of the elements of an executed oral agreement fully understood by all of the parties and carried out by all of the parties within the taxable year.

Respondent's Summary of Argument (Resp. Brief, p. 6) suggests that the "conclusion" of the Tax Court is buttressed by five stated propositions. We will consider them in the order in which they are stated in the Summary of Argument.

1. The first is that the evidence shows that no distributions were, or could be, made without action of the Directors. In the Opening Brief of the Petitioners, we quoted the evidence with respect to the meaning of the phrase "upon action of the organization". (Brief of Petitioners, pp. 14, 15, 18 and 19.) That evidence, and there is no conflicting evidence, shows clearly that the only question to be "acted upon" by the Director members of the Association was the amount of funds necessary to retain to cover possible future contingencies. All of the rest of the money was to be distributed.

2. The second of the Tax Court's "conclusions", as stated in the Summary of Argument, was that there was nothing to prevent the taxpayer's directors from voting regular dividends. There are two answers to this "conclusion": 1st, the contracts of purchase and sale between the Association and its members pre-

cluded the possibility of any "profits" to distribute as dividends; and, 2nd, none were ever declared.

3. The third statement is to the effect that the taxpayer had not adhered to the understanding in practice—a statement directly opposed to all of the evidence which shows beyond question that the taxpayer did distribute all of the funds in its treasury except only that amount which the Director members felt should be temporarily withheld to cover possible future claims.

4. The fact that the taxpayer Association was formed under the General Corporation Laws of the State of California rather than under the specific statutes referring to nonprofit cooperative associations, is relied upon by respondent as a reason for the Tax Court's refusal to recognize the agreements between the taxpayer Association and its members as "fixed liabilities" of the taxpayer Association. It is not clear to us how that fact can have any bearing at all upon the validity of the taxpayer Association's agreements with its members.

5. The fifth "conclusion" is that the Association intended to, and did, engage in export trade for a profit as any other business corporation would have done. The evidence is that the corporation did act in effect as the export department of the various member firms and was no more than an agency used by the member firms to conduct their export trade under agreements which effectively denied to the corporation even the possibility of making a returnable profit.

AN OVERPAYMENT OF TAX GIVES THE TAXPAYER A RIGHT TO REIMBURSEMENT BY THE TAXING AUTHORITIES AND DOES NOT CONSTITUTE THE BASIS FOR ASSESSMENT OF ADDITIONAL OVERPAYMENT BY RESPONDENT.

In that portion of its Brief entitled "Argument", respondent refers to the fact that the tax return filed by the corporation did not claim complete exemption from taxation, apparently on the theory that this initial mistake on the part of taxpayer Association's bookkeepers in some way prejudices the taxpayer's claim to be free of tax. The Tax Court made no such error, and that Court properly stated the issue in the case at Bar as to whether "any of the amounts received by the petitioner for the year in question are taxable to it as income". (Rec. p. 19.) The taxpayer does claim that all of its income belonged to its members, or stated otherwise, that it had no taxable income. Any tax paid by it to the respondent was paid because respondent had ruled that taxpayer was not exempt. If, as we believe, taxpayer has paid a tax improperly assessed against it, then it has a right to file a proper claim for refund and receive reimbursement from the respondent. We see no justification for respondent's argument that, because the taxpayer has actually paid a tax, which it need not have paid, it should now pay a further tax.

The question presented to the Tax Court, and which that Court stated to be the primary question before it, was whether or not the taxpayer Association had any taxable income. That question depends upon the validity or invalidity of its agreements with its members and not upon whether or not the taxpayer made an error in filing its income tax return and in paying to

respondent a tax which should not have been paid and which may, therefore, be recovered back by the taxpayer.

THE DECISION OF THE TAX COURT IS NOT FOUNDED UPON ITS FINDINGS OF FACT BUT IS IN OPPOSITION AND CONTRARY TO THE ONE FINDING OF THE TAX COURT UPON THE SUBJECT AND THE RESPONDENT IS BOUND BY THE FINDINGS OF FACT OF THE TAX COURT.

In its Brief, the Petitioner argued that the decision of the Tax Court was without support in its Findings of Fact. In answer to that proposition, the respondent argues that the Court should consider the Decision as though it were labelled "Findings of Fact", and as authority refers to the decision of this Court in *California Iron Yards Co. v. Commissioner,* 45 Fed. (2d) 514, decided in 1931.

In the case of *Kelleher v. Commissioner of Internal Revenue,* decided by this Court on January 24, 1938, and reported in 94 Fed. (2d) 294, this Court stated at page 295:

> "These were questions of fact, as to which the Board should have made, but did not make, specific findings. Such findings are necessary to a decision of the case and should be made by the Board, not by this Court. In reviewing decisions of the Board, we are not authorized to make findings of fact. Our review is limited to questions of law."

The Court, in effect, thereby overruled its decision in *California Iron Yards Company* case, as appears more clearly in the first sentence of the dissent in the opinion of the *Kelleher* case in which the dissenting Judge

took the same view now taken by counsel for respondent.

In the Brief of Petitioner, we quoted from the decision of the Supreme Court of the United States in the case of *Dobson v. Commissioner,* 320 U. S. 489, the following language from page 502:

> "It is, of course, the duty of the tax court to distinguish with clarity between what it finds as fact and what conclusions it reaches on the law."

It would, therefore, seem clear that the Supreme Court of the United States has thus adopted the rule of this Court as that rule is stated in the *Kelleher* case. The Tax Court, in the case at Bar, clearly distinguished between what it found as fact and its conclusions by labelling its findings of fact as such.

We submit that the decision of the Tax Court is without support in the findings of that Court or in the evidence and must, therefore, be reversed.

Dated, San Francisco,
December 17, 1945.

Respectfully submitted,
W. R. WALLACE, JR.,
W. R. RAY,
Attorneys for Petitioner.

WILLIAMSON & WALLACE,
Of Counsel.